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No. 86-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

INVESTMENT COMPANY INSTITUTE,

Petitioner,

v.

ROBERT L. CLARKE, ET AL.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

APPENDIX

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FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

INVESTMENT COMPANY INSTITUTE,
Plaintiff-Appellee,

vs.

ROBERT L. CLARKE,* as Comptroller of the Currency; the OFFICE OF THE COMPTROLLER OF THE CURRENCY, an agency of the United States; and the UNITED STATES OF AMERICA,
Defendants-Appellants.

and

WELLS FARGO BANK, N.A.; and THE BANK OF CALIFORNIA, N.A.,
Defendants-Intervenors/Appellants.

NOS. 84-2622, 84-2623
D.C. NO. CV 84-0742-WWS

OPINION

Appeal from the United States District Court for the Northern District of California William W. Schwarzer, United States District Judge, Presiding

Argued and Submitted August 12, 1985
San Francisco, California

Before: NORRIS and REINHARDT, Circuit Judges, and COUGHENOUR,** District Judge

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* Comptroller of the Currency Robert L. Clarke has been substituted for his predecessor C. T. Conover, pursuant to Fed. R. App. P. 43(c)(1).

** Honorable John C. Coughenour, United States District Judge for the Western District of Washington, sitting by designation.

REINHARDT, Circuit Judge:

The Comptroller of the Currency, Wells Fargo Bank, and the Bank of California appeal from the district court's grant of summary judgment in favor of the Investment Company Institute. The district court ruled that the operation by the two banks of common funds consisting of commingled individual retirement accounts violated the Glass-Steagall Act, 48 Stat. 162, as amended, and that the Comptroller could not properly authorize the operation of such funds. *See Investment Company Institute v.Conover*, 593 F. Supp. 846 (N.D. Cal. 1984).[1]

Two circuit courts have ruled that the operation of such commingled funds does not violate Glass-Steagall and that the Comptroller could properly authorize their operation. *See Investment Company Institute v. Conover*, No. 85-5019, slip op. (D.C. Cir. May 20, 1986); *Investment Company Institute v. Clarke*, No. 86-6033, slip op. (2d Cir. May 2, 1986) (per curiam). While the Second Circuit's opinion consisted of only a summary affirmance of the district court, the District of Columbia Circuit engaged in an extensive analysis, applying the principle recently restated in *Chevron U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837 (1984), that interpretations of statutes by the agency charged with administering them may not be overturned unless they are unreasonable. The court found that the Comptroller's interpretation of Glass-Steagall was not unreasonable and thus that his authorization of the commingling of individual retirement accounts was proper. *See Investment Company Institute v. Conover*, No. 85-5015, slip op. at 13-26.

The Supreme Court has specifically held that "[t]he Comptroller of the Currency is charged with the enforcement of the banking laws to an extent that warrants" judicial deference to his interpretations of Glass-Steagall unless they are unreasonable. *Investment Company Institute v. Camp*, 401 U.S. 617, 626-27

1. We review the grant of summary judgment *de novo*. *Lojek v. Thomas*, 716 F.2d 675, 677 (9th Cir. 1983); because there are no contested issues of fact, we need decide only whether the district court correctly applied the substantive law. *Lane v. Goren*, 743 F.2d 1337, 1339 (9th Cir. 1984).

(1971). In *Camp* the Court reversed the Comptroller, saying that he had not offered a reasoned explanation for his conclusion. Such is not the case here, however. In his decisions authorizing Wells Fargo Bank and the Bank of California to operate their commingled funds, the Comptroller applied the mode of analysis that *Camp* held to be be appropriate for determining whether Glass-Steagall has been violated.

The district court found the Comptroller's decisions to be "somewhat conclusory" and to "simply disagree with congressional determinations enumerated in *Camp*." 593 F. Supp. at 856. It is easy to understand the district court's view. The Comptroller's analysis appears to be superficial, and in some respects to come perilously close to disregarding the spirit of *Camp* while purporting to adhere to its letter. It also comes perilously close to rejecting the division between commercial banking and investment banking that Congress sought to mandate in Glass-Steagall. Nevertheless, in the end, the Comptroller did apply, however inadequately, the *Camp* test.

In the case before us, the issue the Comptroller was required to decide essentially involved questions of expert judgment regarding the practical operation of the banking industry and the results that might be anticipated if particular business practices were instituted. Congress has delegated responsibility for such business judgments to the Comptroller. Whether he performs his task wisely or well is not for us to decide. Moreover, the practice the Comptroller approved is not prohibited by the plain words of the statute, and in most part, he has not relied on arguments that are inconsistent with or different from those set forth in his decision. *Compare Securities Industry Association v. Board of Governors*, 104 S. Ct. 2979 (1984). While the question is a close one, and certainly not free from doubt, we conclude ultimately, on balance, that we cannot say that the analysis and conclusions set forth in the Comptroller's decisions are unreasonable.

For the above reasons, we join with the Second and District of Columbia Circuits and hold that Wells Fargo and the Bank of California may lawfully commingle individual retirement

accounts in the manner authorized by the Comptroller.[2] The district court's decision is reversed.

REVERSED

2. We also agree with the District of Columbia Circuit that the Employee Retirement Income Security Act of 1974 (ERISA) and its legislative history are not relevant in the decision before us. *See Investment Company v. Conover,* No. 85-5019, slip op. at 15-16. Like the District of Columbia Circuit, we base our decision entirely on the portion of the Comptroller's ruling that relates directly to Glass-Steagall.

INVESTMENT COMPANY INSTITUTE

v.

CLARKE,

NO. 84-2622

JUDGE COUGHENOUR, dissenting:

I must respectfully dissent for the reasons stated in the district court's excellent opinion. *See Investment Company Institute v. Conover,* 593 F. Supp. 846 (N.D. Cal. 19840).

Investment Company Institute

v.

CLARKE,

No. 84-2622

NORRIS, Circuit Judge, concurring especially:

I write separately only to make it clear that I believe the Comptroller's decision allowing banks to operate common funds for Individual Retirement Accounts is consistent with both the Glass-Steagall Act and *Investment Company Institute* v. *Camp*, 401 U.S. 617 (1971). Thus, I do not share Judge Reinhardt's expressed reluctance to join the D.C. Circuit and the Second Circuit in upholding the Comptroller's decision.

[Reprinted]

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

THE INVESTMENT COMPANY INSTITUTE,
Plaintiff,

v.

C.T. CONOVER, Comptroller of the Currency; THE OFFICE OF THE COMPTROLLER OF THE CURRENCY, An Agency of the United States, and THE UNITED STATES OF AMERICA,
Defendants.

No. C-84-0742-WWS

MEMORANDUM OF OPINION AND ORDER

This action for injunctive and declaratory relief challenges two rulings by defendant Comptroller of the Currency ("the Comptroller") approving proposals by two national banks to establish collective investment funds for individual retirement account ("IRA") trust assets exempt from taxation under the Employee Retirement Income Security Act ("ERISA"), 26 U.S.C. § 408. Plaintiff is a national association of open-end investment companies and their investment advisers and principal underwriters. It claims that the rulings authorize defendants Wells Fargo Bank, N.A. ("Wells Fargo"), and Bank of California, N.A. ("Bankcal"),[1] to create what amount to mutual funds in violation of the prohibition against the marketing of securities by commercial banks in the Glass-Steagall Banking Act of 1933 ("Glass-Steagall"), ch. 89, 48 Stat. 162 (codified as amended in scattered sections of 12 U.S.C.). Defendants respond that the approved programs establish not mutual funds but common trust funds which do not violate Glass-Steagall and which are, in any case, expressly authorized by ERISA. Defendants also argue that

1. The complaint named only the Comptroller, his Office, and the United States as defendants. Wells Fargo and Bankcal have moved to intervene as defendants. That motion, apparently unopposed by plaintiff, is hereby granted.

plaintiff lacks standing to bring this action. There being no disputed factual issues, the parties have filed cross-motions for summary judgment.

FACTS

In 1974, Congress added § 408 to the Internal Revenue Code ("I.R.C.") as part of ERISA to encourage individuals to save income for their retirement. Section 408 authorizes the establishment of IRA's, defined as "trust[s] created or organized . . . for the exclusive benefit of an individual or his beneficiaries," to which up to $2,000[2] per year may be contributed, I.R.C. § 408(a)(1). Permissible contributions are tax-deductible and earnings on trust assets are not taxed until distributed, *id.* § 408(d)(1). A tax penalty of 10% is imposed on any distribution of assets in an IRA trust before the settlor reaches the age of 59½, *id.* 408 (f)(1).

Two provisions of § 408 are relevant here. Under § 408(a)(2), only banks and other institutions that receive specific approval of the Secretary of the Treasury may serve as IRA trustees. Section 408(a)(5) prohibits IRA trustees from commingling trust assets "except in a common trust fund or common investment fund."

In 1983, each of the defendant banks decided to establish a Common Trust Fund (collectively "the Funds") under California law for the collective investment of the assets of IRA trusts whose settlors desired such treatment. Pursuant to the Trust Agreements, trust assets are to be invested in several separate investment portfolios, each of which is represented by a separate series of "units of beneficial interest." Each bank acts as trustee and as investment adviser to its Fund and receives monthly fees based in part on the net asset value of the Fund portfolios.

Units in the Funds are available exclusively to IRA trusts established with the banks in compliance with § 408. Investors who open an individual IRA account at the banks may execute a

2. A married couple filing jointly one of whom does not work may contribute up to $2,250 per tax year, I.R.C. § 219(a), (c).

written agreement authorizing investment of IRA trust assets in units of the Funds. The agreement is freely revocable subject to the penalty provisions of § 408, but assets may be transferred from one investment portfolio to another without penalty.

Each bank offers units in its Fund to IRA participants as only one of several IRA alternatives. Investors may choose to have the bank invest their IRA trust assets in the Fund, in certificates of deposit, in the bank's money-market accounts or in self-directed brokerage accounts. IRA trust assets may be transferred among these alternative investments without penalty.

The Securities Exchange Commission ("SEC") has on various occasions expressed the opinion that units of interest in comparable bank funds constitute securities within the meaning of the federal securities laws. Without conceding this characterization, the banks have filed registration statements with the SEC to register their Funds as investment companies under the Investment Company Act ("ICA") and to register the units of beneficial interest as securities under the 1933 Act. The banks claim that the registration merely sought to avoid what they feared might be a costly and time-consuming exemption procedure.

The banks then sought approval of the Funds from the Office of the Comptroller pursuant to its regulations governing the fiduciary powers of national banks, 12 C.F.R. Part 9 (1983). They also sought rulings that the creation of the Funds did not violate §§ 16 and 21 of the Glass-Steagall Act, 12 U.S.C. §§ 24 Seventh and 378(a)(1), which in substance prohibit commercial banks from marketing securities.

On January 27, 1984, the Comptroller issued a formal ruling approving Wells Fargo's Common Trust Fund as consistent with the requirements of 12 C.F.R. Part 9 (except for certain provisions compliance with which was waived under *id.* § 9.18(c)(5))[3] and with the requirements of Glass-Steagall. He found that the applicant Fund "represents the offering of a bona-

3. The Comptroller exempted the Funds, which have supervisory committees of which only a minority is affiliated with the Banks (in accordance with the ICA), from 12 C.F.R. § 9.18(b)(12) requiring exclusive bank management of common trust funds.. He also granted

fide fiduciary service expressly authorized by Congress in ERISA." WF-AR 1-14. Four days later, he issued a short letter approving Bankcal's Fund on the same grounds.[4]

Plaintiff now challenges the Comptroller's rulings under, *inter alia*, the judicial review provisions of the Administrative Procedure Act, 5 U.S.C. §§ 701 *et seq.*, arguing that they are contrary to law and thus void. Defendants respond that the rulings comport with Glass-Steagall, that this Court should defer to the Comptroller's construction of federal banking law, and that plaintiff does not have standing to bring this action. Both sides move for summary judgment.

DISCUSSION

A. Standing.

Defendants argue that plaintiff as a competitor of defendants for the investment of IRA trust assets lacks standing to challenge the Comptroller's rulings because its interests do not fall within the "zone of interests to be protected or regulated by" Glass-Steagall, *see Association of Data Processing Serv. Orgs., Inc. v. Camp*, 397 U.S. 150, 153 (1970). In *Investment Co. Inst. v. Camp*, 401 U.S. 617 (1971) (*"Camp"*), however, the Supreme Court rejected precisely this argument. There, the same plaintiff challenged a regulation of the Comptroller purporting to authorize banks to act as "managing agents" for collective investment funds. Noting that "Congress did legislate against the competition that the [plaintiffs] challenge," the Court concluded that "[t]here can be no real question . . . of [plaintiffs'] standing in light of . . . *Data Processing*," *id.* at 620-21.

Defendants cite Justice Harlan's dissent in *Camp* and then-Circuit Judge Burger's concurrence in the court below, both of which concluded that plaintiff had no standing because Glass-

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an exemption from the requirement in *id.* § 9.18(b)(5)(i) that auditors be responsible only to the bank's board of directors, permitting the Funds' auditors to be responsible to their supervisory committees.

4. In both rulings, the Comptroller relied extensively on the reasoning set forth in his October 21, 1982, decision approving a comparable common trust fund proposed by Citibank, N.A.

Steagall did not seek to protect bank competitors. It is a sufficient response to note that the *Camp* majority rejected these arguments. Moreover, the "zone of protected interests" test established by *Data Processing* on which *Camp* relied has recently been affirmed by the Court, *see Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 475 (1982). *Camp*'s holding that plaintiff can meet both the constitutional and prudential requirements of the standing doctrine under Glass-Steagall is thus controlling.

B. **Standard of Review.**

Defendants correctly argue that this Court must substantially defer to the Comptroller's construction of the federal banking statute with regard to national banking activities within his regulatory jurisdiction, *see Securities Ind. Ass'n v. Board of Governors*, 104 S.Ct. 3003, 3009 (1984) ("*Schwab*"). However, in a companion case to *Schwab*, the Supreme Court cautioned that

> deference is not to be a device that emasculates the significance of judicial review. Judicial deference to an agency's interpretation of a statute "only sets 'the framework for judicial analysis; it does not displace it.'" *United States v. Vogel Fertilizer Co.*, 455 U.S. 16, 24 (1982), *quoting United States v. Cartwright*, 411 U.S. 546, 550 (1973). A reviewing court "must reject administrative constructions of [a] statute, whether reached by adjudication or by rulemaking, that are inconsistent with the statutory mandate or that frustrate the policy that Congress sought to implement." *Federal Election Comm'n v. Democratic Senatorial Campaign Comm.*, 454 U.S. 27, 32 (1981).

Securities Ind. Ass'n v. *Board of Governors*, 104 S.Ct. 2979, 2983 (1984) ("*Becker*"). *Becker* also noted that judicial review should be less deferential to *post hoc* rationalizations of an agency's decisions not articulated at the administrative level, *id.* at 2983-84. The Comptroller's arguments in support of his motion for summary judgment here, at least with regard to the

legality of the Funds under the Glass-Steagall Act, are virtually identical to those on which he expressly based the two rulings challenged by plaintiff. Accordingly, the Comptroller's interpretation of Glass-Steagall should be overturned only if the Court finds that it conflicts with or otherwise frustrates the policies that the statute seeks to implement.

C. **The Glass Steagall Act.**

The Glass-Steagall Act, one of a complex of statutes enacted in response to the national financial crisis of the 1930's, sought to prohibit what Congress considered to be the dangerous entanglement of commercial banks in investment-banking activities. Sections 16 and 21 of the Act, which the Supreme Court has consistently found to "draw the same line," *Becker*, 104 S.Ct. at 2986, prohibit commercial banks from "issuing, underwriting, selling, or distributing . . . securities."[5]

In *Camp, supra*, the Supreme Court explained in some detail the limitations imposed by the Glass-Steagall Act on the types of financial services commercial banks can offer. There, the Comptroller had issued regulations permitting national banks to collectively invest assets received by the bank in trust "[i]n a common trust fund, maintained by the bank exclusively for the collective investment . . . of monies contributed thereto by the bank in its capacity as managing agent," 12 C.F.R. § 9.18(a) (1963). Pursuant to that regulation, the Comptroller approved a commercial bank's plan for the collective investment of managing agency

5. Section 16 provides that the "business of dealing in securities and stock [by a national bank] shall be limited to purchasing and selling such securities and stock without recourse, solely upon the order, and for the account of, customers, and in no case for its own account . . . ." It also provides that a national bank "shall not underwrite any issue of securities or stock."

Section 21 provides that "it shall be unlawful—(1) For any person, firm, corporation, association, business trust, or other similar organization, engaged in the business of issuing, underwriting, selling, or distributing, at wholesale or retail, or through syndicate participation, stocks, bonds, debentures, notes, or other securities, to engage at the same time to any extent whatever in the business of [deposit banking]."

funds not held by the bank in trust. 401 U.S. at 622 & nn. 7-8. Plaintiff challenged the legality of the plan under Glass-Steagall.

The Supreme Court invalidated the Comptroller's ruling. It began with the observation that the commingling of trust assets by national banks in common trust funds was undoubtedly "consistent with the banking laws" and had been "expressly authorized by the Federal Reserve Board by Regulation F promulgated in 1937," *id.* at 624. It also recognized that national banks could act as managing agents and purchase stock for the account of its customers, *id.* at 625.

> But the union of these powers gives birth to an investment fund whose activities are of a different character. The differences between the investment fund that the Comptroller has authorized and a conventional open-end mutual fund are subtle at best, and it is undisputed that this bank investment fund finds itself in direct competition with the mutual fund industry. One would suppose that the business of a mutual fund consists of buying stock "for its own account" and of "issuing" and "selling" "stock" or "other securities" evidencing an undivided and redeemable interest in the assets of the fund. On their face, §§ 16 and 21 of the Glass-Steagall Act appear clearly to prohibit this activity by national banks.

Id. (footnotes omitted).

The Court buttressed its conclusion by underlining the congressional considerations that animate the Glass-Steagall Act. It noted Congress's fear that speculation by banks in the inherently risky securities market could diminish the confidence of commercial depositors. The Court also explored legislative concern with the potential conflicts of interest bound to arise when a commercial bank engages in investment-banking activity. A bank's desire to find new investors to purchase redeemed interests in competition with mutual funds and to support companies whose securities it purchased could generate promotional pressures, affect the bank's loan decision and investment advice, and generally compromise its traditional roles as fiduciary and depository.

> In sum, Congress acted to keep commercial banks out of the investment banking business largely because it believed that the promotional incentives of investment banking and the investment banker's pecuniary stake in the success of particular investment opportunities was destructive of prudent and disinterested commercial banking and of public confidence in the commercial banking system. As Senator Bulkley put it:
>
> > "If we want banking service to be strictly banking service, without the expectation of additional profits in selling something to customers, we must keep the banks out of the investment security business."

Id. at 634 (footnote omitted).

Camp emphasized, however, that although the Glass-Steagall Act prohibited "a bank's entry into the mutual investment business," *id.* at 639, the hazards Congress feared are not present

> when a bank undertakes to purchase stock for the account of its individual customers or to commingle assets which it has received for a true fiduciary purpose rather than for investment. These activities, unlike the operation of an investment fund, do not give rise to a promotional or salesman's stake in a particular investment; they do not involve an enterprise in direct competition with aggressively promoted funds offered by other investment companies; they do not entail a threat to public confidence in the bank itself; and they do not impair the bank's ability to give disinterested service as a fiduciary or managing agent. In short, there is a plain difference between the sale of fiduciary services and the sale of investments.

Id. at 638 (footnote omitted).

Reiterating the concerns relied on in *Camp*, *Becker*, decided by the Court just last Term, concluded that the securities which Glass-Seagall prohibits commercial banks from issuing include commercial paper. The Court looked to the plain meaning of "securities" as evidenced by the definition of the term in the contemporaneously enacted securities acts[6] and to the Glass-

6. The Securities Act of 1933, for example, includes commercial paper as one of the securities exempted from its registration provisions,

Steagall Act's flat prohibition of the issuance of "notes and other securities" regardless of whether "the note is properly viewed as an 'investment,' " 104 S.Ct. at 2988.

Moreover, the Court in *Becker* worried that a bank's entry into the commercial-paper market might create a "salesman's interest" in particular offerings inconsistent with the bank's roles as lender, depository and investment adviser. It noted that banks might "enhance the marketability of an issue by extending back-up credit to the issuer," "purchase unsold notes in order to demonstrate the reliability of [their] distrtibution system[s]," or "use their relationships with depositors to facilitate the distribution of securities in which the bank has an interest," *id.* at 2989-90. The Court further suggested that

> [b]y giving banks a pecuniary incentive in the marketing of a particular security, commercial-bank dealing in commercial paper also seems to produce precisely the conflict of interest that Congress feared would impair a commercial bank's ability to act as a source of disinterested financial advice.

Id. at 2990. In sum, it found all of the concerns behind the Glass-Steagall Act implicated by the banks' effort to "put[] [themselves] in competition with [securities dealers], *id.* at 2989, citing *Camp*, 401 at 637.

Relying on *Camp* and on the appellate decision in *A.G. Becker, Inc. v. Board of Governors*, 639 F.2d 136 (D.C. Cir. 1982), which the Supreme Court subsequently reversed in *Becker*, the Comptroller reasoned that interests in the Funds at issue here were not "securities" within the meaning of the Glass-Steagall Act, although they might be for purposes of the securities laws, because of their "bona fide fiduciary purpose." He also determined that the state trust law, federal regulations and provisions of ERISA to which the Funds are subject would avert the hazards Congress sought to prevent by the Glass-Steagall Act. Plaintiff claims both conclusions are incorrect.

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15 U.S.C. § 77c(a)(3), but covered by its antifraud provisions, *id.* §§ 771, 77q(c). *See Becker*, 104 S.Ct. at 2987 & n. 7.

1. **"Securities" and Bona Fide Fiduciary Purpose.**

Plaintiff asserts first that, under *Becker*, the term "securities" in the Glass-Steagall Act must be interpreted according to its plain meaning. Moreover, plaintiff argues, *Becker* held that securities for purposes of the federal securities laws are also securities under Glass-Steagall. Inasmuch as interests in the Fund challenged here are plainly securities within the common meaning of the term and, according to the SEC, within the meaning of the Securities Act of 1933, plaintiff reasons, they must be found to violate Glass-Steagall.

The issue, however, is not so simple, in part because of the regulatory and judicial treatment accorded common trust funds over the past fifty years. As *Camp* noted, banks have been expressly empowered to create common trust funds since the Federal Reserve Board adopted section 17 of Regulation F in 1937 pursuant to its authority under repealed 12 U.S.C. § 248(a). In 1962, Congress transferred authority over bank trusts to the Comptroller, 12 U.S.C. § 92a, who adopted 12 C.F.R. § 9.18 to regulate common trust funds. The jurisdictional transfer, however, did not "modify[] any provision of substantive law," *Camp*, 401 U.S. at 621-22.

Although *Camp* made clear that the commingling of trust assets does not violate the Glass-Steagall Act as long as they are "received for a true fiduciary purpose rather than for investment," *id.* at 638, it is equally clear that "securities is defined broadly enough in the 1933 and 1934 Securities Acts to encompass interests in common trust funds, *see* 15 U.S.C. § 77b(1). In fact, the 1933 Act, 15 U.S.C. § 77(c)(a)(2) was amended in 1970 to add interests in bank common trust funds to the "classes of securities" exempted from its registration provisions[7] though not from its

7. Until 1970, the SEC "generally believed that operation of a common trust fund would fall within section 4(2) of the Securities Act of 1933, [15 U.S.C.] § 77d(2), for offerings not involving a public offering." Lybecker, Bank-Sponsored Investment Management Services: Consideration of the Regulatory Problems, and Suggested Legislative and Statutory Interpretive Responses, 1977 Duke L.J. 983, 993 n.41.

fraud provisions.[8] *See also* 15 U.S.C. § 80a-3(c)(3) (exempting common trust funds from ICA regulations). That interests in the investment funds at issue here may be securities under the securities laws, therefore, does not compel the conclusion that they are securities within the meaning of the Glass-Steagall prohibition;[9] if it did, *all* common trust funds would violate the Act, a conclusion that *Camp* precludes.[10]

The proper inquiry under *Camp* is whether the assets commingled in defendant banks' Funds are "received for a true fiduciary purpose rather than for investment," 401 U.S. at 638. The Comptroller based his finding of a bona fide fiduciary purpose on several factors. He pointed out that ERISA sets strict limits on the amount of funds IRA participants can invest each year and that, although the trust agreements are nominally revocable, the 10% tax penalty imposed by § 408(f)(1) effectively precludes early distribution and ensures their use for retirement savings. Moreover, units in the Fund are not transferable to other individuals and cannot serve as security for a loan. Finally, only individuals eligible under § 408 may invest in the Funds which are marketed only as part of "an overall IRA program." Mutual funds prohibited by the Glass-Steagall Act, defendants contend, share none of these characteristics.

The Comptroller also reasoned that the bona fide fiduciary character of the Funds is established by the complex regulations

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8. *Becker* made clear that the term "securities" in the Glass-Steagall Act may include securities exempted in § 3(a) of the 1933 Act. See text at note 6, *supra*.

9. Contrary to plaintiff's assertion, *Becker* did not hold that the definitions of "security" in the 1933 Act and Glass-Steagall are coterminous. It merely characterized the 1933 definition as evidence of congressional intent in the Glass-Steagall Act.

10. Defendants point to the fact that corporate and Keogh employee benefit plan trusts qualified under I.R.C. § 401 and commingled in a bank common trust are expressly exempted from the registration and regulatory requirements of the 1933 Act and the ICA, 15 U.S.C. §§ 78c(a)(2), 80a-3(c)(3). IRA common trust funds, however, are not so exempted. Moreover, exemption under § 3(a)(2) does not necessarily imply exclusion from Glass-Steagall, see footnote 8 supra. Finally, it is not clear and the Court need not decide whether all corporate and Keogh common trust funds are permitted under Glass-Steagall regardless of how marketed.

to which bank common trust funds are subject under state and federal law. California imposes strict fiduciary obligations upon trustees, *see* Cal. Civ. Code § 2228-2239, requiring for example that they "act in the highest good faith toward [their] beneficiar[ies]," *id.* § 2228, and prohibiting self-dealing, *id.* §§ 2230-2233. Similarly, 12 U.S.C. § 92a and the Comptroller's regulations in 12 C.F.R. Part 9 govern the administration of fiduciary powers, *id.* § 9.7, audits, *id.* § 9.9, self-dealing, § 9.12, and compensation, § 9.15. Moreover, § 9.18 provides for more rigorous regulation of common trust funds. Finally, § 408 itself imposes additional restrictions on IRA trustees, *see, e.g.*, § 408(a)(3).

It is clear, however, that under *Camp* the validity of an investment fund under the Glass-Steagall Act does not hinge on its trust form *vel non*. Although the fund held illegal there was not a trust but a managing agency account, the Court expressly noted that in enacting Glass-Steagall Congress was concerned with investment trusts:

> The Glass-Steagall Act was the product of hearings conducted pursuant to Senate Resolution 71 which included among the topics to be investigated the impact on the banking system of the formation of investment and security trusts. The subcommittee found that one of the activities in which bank security affiliates engaged was that of an investment trust: "buying and selling securities acquired purely for investment or speculative purposes." Since Congress generally intended to divorce commercial banking from the kinds of activities in which bank security affiliates engaged, there is reason to believe that Congress explicitly intended to prohibit a national bank from operating an investment trust.

401 U.S. at 635 (footnotes omitted).

Even a fund governed by state and federal trust law would violate the Act if not limited to fiduciary purposes.

Regulation by the Comptroller, moreover, does not suffice to relax Glass-Steagall concerns. Confronted with a similar argument, *Becker* reviewed the legislative history and concluded that

"Congress rejected a regulatory approach when it drafted the statute, and it has adhered to that rejection ever since," *Becker*, 104 S.Ct. at 2988. The Glass-Steagall Act relies not on administrative regulation but rather on flat prohibition to "separate as completely as possible commercial from investment banking," *Board of Governors v. ICI*, 450 U.S. 46, 70 (1981).

Most significantly, the regulations on which the Comptroller relies provide that "a national bank administering a collective investment fund shall have the exclusive management thereof," 12 C.F.R. § 9.18(b)(12). Here, the Comptroller exempted the Funds from § 9.18(b)(12) in order to permit them to qualify for registration under the ICA which requires that a majority of their board of directors not be affiliated with any one bank, 15 U.S.C. § 80a-10(c), *see* footnote 3 *supra*. The comptroller found that the delegation of Fund managment to a "supervisory committee" would not detract from the Banks' "responsibility for day-to-day activities of the Trust[]" and that the banks could "generally be held fully accountable for actions taken in contravention of [their] fiduciary responsibilities." The clear purpose of § 9.18(b)(12), however, is to ensure that banks retain *exclusive* fiduciary responsibility for their common trusts. They cannot meet that responsibility when, as the Comptroller found here, they delegate "ultimate control" over Fund affairs to outsiders. Thus the Fund's exemption from § 9.18(b)(12) renders the Comptroller's conclusion insupportable.

Additional evidence of the investment, as opposed to fiduciary, character of the funds is offered by 26 Fed. Res. Bull. 393 (1943), cited with approval by *Camp*, 401 U.S. at 621, 638 & n.37. In explaining § 17 of its Regulation F, the Board noted that

> [w]hile the operation of a Common Trust Fund might... enable a trust institution to accept small trusts which it otherwise would be unwilling to handle, it was contemplated that trust guise or form should not be used to enable a trust institution to operate a Common Trust Fund as an investment trust attracting money seeking investment alone and to embark upon what would be in effect the sale

> of participations in a Common Trust Fund to the public as investments.

As an example, the Board cited its prior ruling that solicitation of the public to create uniform revocable trusts designed specifically to participate in a common trust fund would not conform with the regulation.

Similarly, 42 Fed. Res. Bull. 228 (1956), also cited by *Camp*, explains that

> the tone of common trust fund advertising should in every manner be appropriate to the collective uses and advantages of such funds without seeking to popularize any particular use or advantage. However, advertising which fails to make clear that a common trust fund is solely a facility for the investment of funds held for true fiduciary purposes or advertising which overemphasizes the advantages of such funds for investment or estate building purposes would be inconsistent with the applicable restrictions on publicity of such funds.

The emphasis in *Camp* and in the Reserve bulletins cited above on the manner in which funds are established and promoted to the investing public is underlined by recent SEC interpretation of the exemption in § 3(a)(2) of the 1933 Act and of § 3(c)(3) of the ICA for common trust funds. As has been noted, securities exempted under § 3(a)(2) are not thereby excluded from the Glass-Steagall Act, *see* footnote 8 *supra*. The SEC has consistently interpreted the (3)(a)(2) and (3)(c)(3) exemptions for common trust funds as coextensive with the criteria of *Camp* and § 17 of old Regulation F, however, by relying on legislative history that the exemptions are limited to "funds maintained by a bank for the collective investment of assets held by it in a bona fide fiduciary capacity and incident to a bank's traditional trust department activities," H.R. No. 1382, 91st Cong., 2d Sess. 43 (1970), *cited in United Missouri Bank of Kansas City, N.A.*, SEC No-Action Letter (Dec. 1, 1981). Numerous SEC no-action letters cited by plaintiff suggest that exemption is not available for common trust funds "promoted or merchandised as

a pooled investment vehicle," *First Pennsylvania Bank*, SEC No-Action Letter (Dec. 3, 1977). Moreover, with regard to an IRA common trust fund under § 408, the agency has held exemption unlikely if "interests in it are offered, directly or indirectly, through, for example, the use of standardized revocable trusts to the public as investments," *Continental Bank*, SEC No-Action Letter (August 3, 1982). Exemption would be appropriate, on the other hand, where the "participating IRA trusts in the Common Fund pre-existed the Common Fund and do not appear to have been created as a means of investing in any fund," *id.*.

Measured against this standard, the Funds offered by defendant banks do not meet the bona fide fiduciary requirement set forth in *Camp*. Wells Fargo and Bankcal each promote their Funds as vehicles for pooled investment. Rather than commingle the assets of pre-existing[11] trust accounts, they seek to attract investors by promoting the advantages of particular investment portfolios in direct competition with mutual funds. Both banks offer standardized, revocable trust agreements. Wells Fargo's marketing brochure, moreover, informs potential customers that they can "invest all or part of their IRA funds in the stock market through two innovative investment funds." It goes on to say:

> These funds are highly liquid—you can "cash in" by transferring to another Wells Fargo IRA option at any time. Each fund requires a minimum $250 investment—less than most mutual funds. These are no-load funds.

The brochure then describes the various portfolios labelled "Corporate Stock Fund" and "Small Companies Stock Fund" and concludes by warning that "as with any investment fund, your deposits are not insured against loss in event of a market decline." Bankcal's literature is similar.

11. Plaintiff correctly defines "pre-existing" in this context to include trusts "both on the books now or to come on the books in the natural course of business." The Glass-Steagall Act does not forbid the commingling of trust assets in a common trust fund previously created. Instead, it prohibits the solicitation of trust funds for investment rather than bona fide fiduciary purposes. Defendants' argument that establishment of the common trust fund only after formation of the individual trusts would be overly burdensome is thus misdirected.

That eligible IRA participants, of whom it is conceded there are in excess of 100,000,000, cannot invest more than $2,000 per year does not detract from the investment character of the Funds. Moreover, although the 10% penalty makes early distributions unlikely, invested funds can be "rolled over" into other, more secure IRA accounts such as certificates of deposit and are thus, in a sense, as liquid as if there were no penalty. Finally, the retirement purpose of IRA accounts is not inconsistent with the investment, as opposed to the fiduciary, character of the Funds: long-term investments are a common means of providing post-retirement income.

2. **Glass-Steagall Hazards.**

In determining that the Funds do not violate the Glass-Steagall Act, the Comptroller also relied on his conclusion that they do not implicate the hazards which the Act seeks to avert. He found that the reputation of the Banks would not suffer given "the absence of any current adverse effects on the reputation of banks arising from their significant involvement in the collective investment of pension fund assets." He also doubted that the Funds would affect the Banks' loan decisions because "in the case of a highly diversified fund, it seems implausible that the Bank would be tempted to lend to any issuer whose securities are held by the fund merely to support the fund." Similarly "implausible" to the Comptroller was the possibility that the Funds might compromise the objectivity of the Banks' investment advice or that "high-volume unit redemption would occur." Finally, the Comptroller noted that these hazards are equally likely whenever a bank engages in traditional fiduciary activities.

It appears, however, that the Comptroller's somewhat conclusory findings simply disagree with congressional determinations, enumerated in *Camp* and *Becker*, regarding the potential dangers of commercial bank entry into the field of investment banking. The objectivity of banks' loan decisions and of their investment advice is no less likely to be affected by their promotional interest in funds of the kind challenged here than it would

be by the managing accounts held illegal in *Camp*, regardless of the degree of the diversity of investments in the fund at issue there. As in *Camp*, because it is not "a matter of indifference to the bank whether the customer buys an interest in the bank's fund or makes some other investment," 401 U.S. at 636, the banks here may well be tempted to advise customers to purchase shares in the Funds for reasons other than the comparative merit of available investments. And even if high-volume redemption is unlikely, the possibility of "roll over" may exert pressures on the Banks to sell additional units comparable to those in *Camp*.

Moreover, although traditional fiduciary and investment services of banks might give rise to similar abuses, *Camp* makes clear that it is the manner in which such services are offered and marketed that invokes Glass-Steagall concerns. Promoted as pooled investment vehicles designed to compete with mutual funds, the Funds at issue here could tend to create a greater "salesman's stake" than do traditional common trust funds. This is especially so where, as here, the Banks, receive a fee directly proportional to the net asset value of the funds' portfolios. In sum, defendant Banks' establishment and promotion of Funds as investments in competition with mutual funds could generate precisely the hazards feared by Congress in enacting Glass-Steagall.

D. **ERISA.**

Defendants also argue that even if the Funds would otherwise violate Glass-Steagall, they are expressly authorized by ERISA whose subsequently enacted, more specific provisions should control.[12] The argument is without merit.

12. Significantly, the Comptroller's rulings did not rest on this ground. They noted merely that ERISA authorizes banks to commingle IRA trust assets in common trust funds, a contention plaintiff does not dispute. They also cited to the Comptroller's earlier ruling with regard to Citibank, see footnote 4 supra, which framed the issue as follows:

> Having determined that collectively investing the assets of IRA trusts is a permissible trust service sanctioned by statute and the Constitution's requirements, it is necessary to determine

To begin with § 408, on which defendants rely, provides that IRA trustees must be banks or other persons approved by the Secretary of the Treasury and that trust assets "will not be commingled with other property except in a common trust fund or common investment fund." The statutory language simply authorizes banks to place IRA assets in collective investment funds in accordance with their traditional fiduciary duties. Nothing in § 408 purports to permit banks to market interests in funds created as an investment vehicle.

Moreover, the legislative history cited by both parties evidences Congress's intent to permit IRA trust assets to be invested in mutual funds but to be commingled only in common trust funds such as those traditionally established by banks for purposes of diversifying investments. The House Report on § 408, for example, stated:

> The balance in an individual retirement account generally may be invested in any assets that are acceptable investments for a qualified plan. The account balance could, for example, be invested in insurance annuity contracts, in a savings account with a savings and loan institution or a credit union, or in stock of a mutual fund. However, account assets generally are not to be commingled with other property except in a common trust fund.

H.R. Rep No. 93-807, 93d Cong., 2d Sess. (1974), *reprinted in* [1974] U.S. Code Cong. & Admin. News 4797-98. Similarly, the House Conference Report stated:

> the assets of an individual retirement account may not be commingled with other property, except in a common trust fund or investment fund (i.e., a group trust), solely for the purposes of diversifying investments. . . .

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whether [the Glass-Steagall Act] imposes any impediment to a bank offering these fiduciary services.

The Court need not defer to statutory construction now offered for the first time by defendants' counsel. See *Becker*, 104 S.Ct. at 2983 ("*post hoc* rationalizations by counsel for agency action are entitled to little deference").

H. Conf. Rep. No. 93-1280, 93d Cong., 2d Sess. (1974), *reprinted in* [1974] U.S. Code Cong. & Admin. News 5117. The passages cited clearly indicate that Congress meant for the traditional distinction between mutual funds and common trust funds to survive.

Defendants argue that in enacting § 408, Congress had before it the example of qualified corporate and Keogh employee benefit plan trusts which, they contend, are marketed to the public in precisely the same way as the Funds at issue here. They point to nothing in the legislative history, however, indicating express or implicit approval of bank promotion of employee benefit trusts in a manner violative of the Glass-Steagall Act. Nor do defendants cite evidence that Congress considered SEC registration of interests in certain employee benefit plan trusts or, for that matter, in IRA trusts sufficient to eliminate Glass-Steagall concerns. Moreover, as plaintiff contends, no court or federal banking agency has evaluated the legality of particular employee benefit plan trusts in light of *Camp*, and their generic legality is not at issue in this action.

Furthermore, nothing in ERISA's legislative history suggests an intent to override the prohibitions of the Glass-Steagall Act. The House Conference Report expressly noted that "this legislation . . . is not to limit in any way the application of the Federal securities laws to [IRAs] *or the application to them of the laws relating to common trusts or investment funds maintained by any institution.*" *Id.* (emphasis added).

Finally, defendants argue that invalidation of the Funds will defeat the intent of ERISA to make bank collective investment as widely available as possible to millions of eligible IRA participants. But plaintiff does not argue, and the Court does not hold, that banks cannot establish common trusts funds for IRA trust assets or cannot publicize their existence to potential IRA participants. Rather, they are precluded from marketing participations in the Funds as securities in competition with mutual funds.[13]

13. Defendants cite Franklin Nat. Bank v. New York, 347 U.S. 373, 378 (1954), for the proposition that a bank may lawfully advertise any service it offers. That case upheld a national bank's use to advertise

ERISA's goals are not hampered by Glass-Steagall's prohibitions any more than are those of 12 U.S.C. § 92a authorizing banks to establish trusts and act as trustees.

E. CONCLUSION.

The governing standards for determining whether a common trust fund is promoted for fiduciary or investment purposes were set forth in 41 Fed. Res. Bull. 142 (1955), cited by *Camp*:

> The unsolicited furnishing of information to the general public, or to selected portions of the public, should be confined to acquainting the reader with the existence of the common trust fund and the purpose and use of such fund. It is wholly appropriate, therefore, to publicize the fact that a common trust fund has been established or is maintained by a bank as well as to make known its special and restricted purposes and uses. However, the common trust fund is not to be regarded as an investment entity to be popularized in and of itself. Publicity efforts of a trust institution operating a common trust fund should be directed toward demonstrating the desirability of and need for corporate fiduciary services. Reference to the common trust fund in such publicity should be incidental to the provision of such services and should be discussed only as one medium possibly to facilitate the investment of funds held for true fiduciary purposes. Furthermore, trusts created and used for bona fide fiduciary purposes are to be distinguished from trusts created by individuals primarily seeking the benefits to be derived from corporate fiduciary investment management.

Defendant banks' Funds as now established and promoted clearly fall on the investment side of the distinction, especially in light of their exemption from the Comptroller's own fiduciary regulations, and they therefore run afoul of the Glass-Steagall

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federally-authorized savings deposits of the word "savings" in violation of state legislation. *Camp* held, however, that one factor in determining whether a bank's investment fund violates the Glass-Steagall Act is the manner in which it is promoted. The legality of defendant banks' advertising is thus not in question. Rather, the manner in which they market their Funds bears on their "bona fide fiduciary purpose."

Act. The Comptroller's rulings must be set aside. Accordingly, plaintiff's motion for summary judgment is granted and defendants' motion denied.

IT IS SO ORDERED.

DATED: August 28, 1984

/s/ WILLIAM W. SCHWARZER

WILLIAM W SCHWARZER
United States District Judge

[Reprinted]

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

INVESTMENT COMPANY INSTITUTE,

Plaintiff,

v.

C. T. CONOVER, As Comptroller of the Currency, and THE OFFICE OF THE COMPTROLLER OF THE CURRENCY, an agency of The United States, and THE UNITED STATES OF AMERICA,

Defendants.

No. C-84-0742-WWS

JUDGMENT

Upon consideration of the motion of defendants C. T. Conover, the Office of the Comptroller of the Currency, and the United States of America ("defendants") for summary judgment; the motion of intervenor-defendants Wells Fargo Bank, N.A., and Bank of California, N.A. ("intervenor-defendants") for summary judgment; the cross-motion of plaintiff Investment Company Institute for summary judgment; and the entire record herein, it is this 17th day of September, 1984:

ORDERED, DECLARED and ADJUDGED that the motions of defendants and intervenor-defendants for summary judgment BE, and hereby ARE, DENIED, and that the cross-motion of plaintiff for summary judgment BE, and hereby IS, GRANTED;

FURTHER ORDERED, DECLARED, and ADJUDGED that the January 27, 1984 and January 31, 1984 rulings of the defendants ("rulings") are not in accordance with law and therefore are set aside, 5 U.S.C. § 706(2)(A); and

ENTERED IN CIVIL DOCKET Sept. 19, 1984

FURTHER ORDERED AND ADJUDGED that the defendants and their successors, agents, employees, representatives and others acting in concert with them BE and hereby ARE permanently enjoined and directed to withdraw the rulings forthwith and to give the rulings no force and effect.

9/17/84 /s/ WILLIAM W. SCHWARZER

WILLIAM W. SCHWARZER
UNITED STATES DISTRICT
JUDGE

Comptroller of the Currency
Administrator of National Banks

Washington, D.C. 20219

DECISION OF THE OFFICE OF THE COMPTROLLER OF THE CURRENCY ON THE APPLICATION BY WELLS FARGO BANK, N.A., TO ESTABLISH A COMMON TRUST FUND FOR THE COLLECTIVE INVESTMENT OF INDIVIDUAL RETIREMENT ACCOUNT TRUST ASSETS EXEMPT FROM TAXATION UNDER SECTION 408(a) OF THE INTERNAL REVENUE CODE OF 1954, AS AMENDED.

Introduction

Wells Fargo Bank, N.A. ("Wells Fargo" or the "Bank") proposes to establish a common trust fund ("Trust") for the collective investment of individual retirement account ("IRA") trust assets exempt from taxation under Section 408 of the Internal Revenue Code of 1954, as amended ("I.R.C."). Wells Fargo has requested this Office's confirmation that the Trust's activities comply with this Office's regulations governing the fiduciary powers of national banks, 12 C.F.R. Part 9, and with relevant provisions of the national banking laws, notably certain requirements of the Banking Act of 1933, as amended, 12 U.S.C. §§ 24 (Seventh), 377, 378 and 78 ("Glass-Steagall Act"). For the reasons set forth below, this Office is of the view that the activities of the Trust, as hereinafter described, constitute bona fide fiduciary activities which comply with the requirements of 12 C.F.R. Part 9 (except for certain provisions with respect to which this Office exercises its approval authority under 12 C.F.R. § 9.18 (c) (5)) and are not inconsistent with the requirements of the Glass Steagall Act.

The Trust

Wells Fargo has established the Trust under the laws of California as a trust pursuant to a Declaration of Trust ("Trust

Agreement"). Under the Trust Agreement, Wells Fargo will act as the exclusive trustee ("Trustee") of the Trust. The Trust Agreement provides that Wells Fargo, as Trustee, will act as investment adviser, administrator, custodian and transfer agent to the Trust, and will have the power and authority necessary to act on behalf and for the protection of the Trust with respect to the investment, redemption, holding and distribution of Trust assets; Wells Fargo, as Trustee, also has executed an investment advisory agreement with the Trust. The activities of the Trustee will be conducted under the direction of a supervisory committee of the Trust, the members of which will assume those powers and duties imposed on investment company directors under the Investment Company Act of 1940 ("Investment Company Act") (15 U.S.C. §§ 80a-1 *et seq.*), and a majority of whose members will not be officers, directors or employees of the Bank within the meaning of the Investment Company Act.

Under the Trust Agreement, beneficial interests in the Trust will be divided into two series of non-transferable Units. The first series of Units will represent interests in a Corporate Index Fund, the assets of which shall be invested in a portfolio of common stocks approximating the capitalization-weighted composition of the Standard and Poor's 500 Stock Price Composite Index. The second series of Units will represent interests in Small Companies Stock Fund, the assets of which will be invested in a portfolio of equity securities approximating the capitalization-weighted composition of the Wells Fargo Bank Small Companies Stock Index, an index consisting of the fifth quintile of companies (bottom 20%) whose securities are listed on the New York Stock Exchange. The assets of each of the two funds, however, will be invested in money-market instruments pending the attainment by each fund of a specified minimum level of funding.

Units in the Trust will be available exclusively to IRA trusts which are establishes with Wells Fargo in compliance with I.R.C. § 408, including simplified employee pensions created under I.R.C. § 408(j)-(k) ("qualified IRA trusts"). If, at any time, an IRA trust participating in the Trust ceases to be a qualified

IRA trust, the Trust Agreement provides that the Trustee shall withdraw from the Trust all Units owned by that participating trust. Each qualified IRA participant will execute a written agreement with Wells Fargo authorizing Wells Fargo, as trustee of the IRA trust, to invest IRA trust assets in Trust Units in conformance with the Trust Agreement. Qualified IRA trusts may place their assets in one or both series of Trusts Units, and may thereafter transfer assets from one series of Units to the other. Wells Fargo has received an opinion of counsel stating that the Trust qualifies as a common trust fund under I.R.C. § 584, and has applied to the Internal Revenue Service ("IRS") for a ruling to that effect.

The Trust Agreement, Trust registration materials, and relevant provisions of federal and California laws and regulations, together impose several significant restrictions on the activities of the Trust and Trustee. Under sections 2228-2239 of the California Civil Code, Wells Fargo, as Trustee, generally is required to administer the Trust for the exclusive benefit of the respective participants, and may not take any actions not explicitly permitted under the Trust Agreement which are inconsistent with the interests of these participants. In addition, Wells Fargo represents it will not promote its credit facilities to customers as a means of funding qualified IRA trusts, and qualified IRA trusts otherwise pledged or used as security for any loan will lose their qualified status under I.R.C. § 408 and hence their eligibility for participation in the Trust. The Trust also is precluded from investing in any securities or deposit instruments of Wells Fargo or its affiliates, and may not make any loans to Wells Fargo or any affiliate thereof. Moreover, Wells Fargo otherwise is precluded under this Office's regulations from having any interest in the Trust other than in its fiduciary capacity. 12 C.F.R. § 9.18(b)(8).

Wells Fargo intends to offer the Trust to IRA customers as part of a total IRA program, and will advertise the Trust as being merely one of several IRA alternatives. Specifically, Wells Fargo will offer the following IRA management alternatives: (i) Wells

Fargo certificates of deposit; (ii) the Trust; and (iii) self-directed brokerage accounts, transactions for which will be introduced by Wells Fargo for execution, clearance and settlement by an unaffiliated broker-dealer. IRA Trusts will be able to select one or more of the available IRA alternatives and thereafter to transfer assets from one alternative to another. IRA Trusts which participate in more than one of Wells Fargo's IRA alternatives will receive one consolidated account statement reflecting activities in each of the IRA options selected. Although Wells Fargo has established a separate schedule of fees for each of its IRA alternatives, the Bank's internal profit projections have been developed on a consolidated basis for all IRA alternatives. Accordingly, the Trust will not be marketed as a separate investment service independent of the other IRA options being offered.

In view of positions previously articulated by the Securities and Exchange Commission ("SEC") and its staff concerning the applicability of the Investment Company Act and the Securities Act of 1933 (15 U.S.C. §§ 77a *et seq.*) ("Securities Act") to collective investment funds consisting of IRA trusts, Wells Fargo has determined to register the Trust with the SEC as an investment company under the Investment Company Act, and to register the Trust Units under the Securities Act, rather than undertaking the protracted process of seeking possible exemptions from these requirements.

Discussion

Wells Fargo's proposal to establish a collective fund for the collective investment of IRA trust assets is not a question of first impression for this Office. We previously have determined that the commingling of retirement trust assets by a national bank is a traditional bank fiduciary service explicitly acknowledged by this Office's fiduciary service regulations. *Decision of the Comptroller of the Currency on the Application by Citibank, N.A., Pursuant to 12 C.F.R. § 9.18(c)(5) to Establish Common Trust Funds for the Collective Investment of Individual Retirement Account Trusts Exempt from Taxation Under Section 408 of the Internal*

Revenue Code of 1954 (Oct. 21, 1982) ("*Citibank Decision*"),[1] at 2-3. Moreover, as previously observed, the commingling of IRA trust assets by a bank through the vehicle of a common trust fund or common investment fund was expressly recognized and confirmed by the Congress in the Employee Retirement Income Security Act of 1974 ("ERISA"). *Citibank Decision*, at 3-6. We further determined that the commingling of individual retirement trust assets as part of a bona fide fiduciary service was consistent with the requirements of the Glass-Steagall Act, as stated by the U.S. Supreme Court in *Investment Company Institute v. Camp*, 401 U.S. 617 (1971) ("*ICI v. Camp*"). *Citibank Decision*, at 6-11, 18-19.

A. Compliance of Trust with Supervisory Requirements Concerning the Collective Investment of Retirement Funds By National Banks

The regulations of this Office concerning the collective investment of funds received in a fiduciary capacity are set forth in 12 C.F.R. Part 9, particularly 12 C.F.R. § 9.18. Title 12 C.F.R. Part 9 has been promulgated by this Office pursuant to the authority of 12 U.S.C. § 92a, which confers on national banks the right, subject to the approval of this Office and when not in contravention of local law, to engage in trust activities. Under these regulations, national banks are permitted to invest collectively, either by means of a common trust fund or a collective fund composed exclusively of assets of tax-exempt retirement, pension, profit-sharing, stock bonus or other similar trusts, funds received in a fiduciary capacity, subject to a number of requirements and restrictions.

This Office has examined the Wells Fargo application and supporting materials, and has determined that the administration of the Trust satisfied the requirements of 12 U.S.C. § 92a and 12 C.F.R. § 9.18, subject to certain exceptions as to which this Office

1. This decision has been challenged. *Investment Company Institute v. Conover*, Civil Action No. 83-0549, *dismissed without prejudice* (D.D.C. Nov. 30, 1983).

exercises its administrative approval authority under 12 C.F.R. § 9.18(c)(5) in order to allow the Trust to operate.

The provisions of the Trust Agreement governing, among other things, proportional interests, valuations, distributions, segregation, expenses, and evidences of interest comply with relevant provisions of 12 C.F.R. § 9.18.[2] Because the Trust consists exclusively of retirement assets which are held by Wells Fargo, the Trust is qualified under 12 C.F.R. § 9.18(a)(2) as a collective investment trust fund not subject to the advertising restrictions of 12 C.F.R. § 9.18(b)(5). *See* Comptroller's Trust Opinion No. 9.6100. Moreover, the Trust Agreement's prohibitions on transactions between the Trust on the one hand, and Wells Fargo and its affiliates on the other hand, and restrictions on Trust borrowings and Unit pledgings, satisfy the self-dealing and conflicts provisions of 12 C.F.R. § 9.18(b)(8). *See also* 12 C.F.R. § 9.12.

One provision of 12 C.F.R. § 9.18 which raises a question regarding the Trust's compliance is the requirement of 12 C.F.R. § 9.18(b)(12), which provides that a national bank must maintain "exclusive management" of its collective investment funds. Wells Fargo, out of an abundance of caution and in order to avoid protracted hearings before the SEC on requests for exemption, has chosen to register the Trust with the SEC under the Investment Company Act,[3] which states, among other things, that no investment company may have a board of directors of which a

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2. Wells Fargo's fee structure for its IRA accounts will vary according to the deposit and investment options selected by the account holder. Fees charged to qualified IRA trusts participating in the Trust will be higher than those fees charged to IRA trusts which select the Bank's certificate of deposit option, although the Trust fees will be lower than those charged to IRA trusts choosing the self-directed brokerage option. The proportionate fee requirements of 12 C.F.R. § 9.18(b)(12) are satisfied, however, inasmuch as, according to Wells Fargo, the proportionate fees charged to participating IRA trusts would be much lower than any fees which would be charged to an IRA trust participant seeking to place assets in an individually-managed portfolio of securities approximating the investment strategies incorporated into the Trust Agreement.

3. *See discussion* at pp. 19-20 *infra*.

majority are officers, directors or employees of one bank. Investment Company Act § 10(c) (15 U.S.C. § 80a-10(c)). Accordingly, the overall direction of the Trust's affairs will be under the Trust's supervisory committee, the majority of which will be unaffiliated with Wells Fargo. Consequently, it may be argued that the Trust's compliance with the unaffiliated director provisions of the Investment Company Act is inconsistent with the "exclusive management" provisions of 12 C.F.R. § 9.18(b)(12).

We previously observed in the *Citibank Decision* that it was not clear that the Citibank collective trust approved in that decision, which also provided for a supervisory committee the majority of whose members would not be affiliated with the bank, would violate the exclusive management provisions of 12 C.F.R. § 9.18(b)(12), inasmuch as, "among other things, [Citibank] will serve at the outset as the investment adviser to the collective fund." *Citibank Decision*, at 18. Nevertheless, it was determined therein that approval was appropriate pursuant to this Office's authority under 12 C.F.R. § 9.18(c)(5) to permit the Citibank collective trust to operate in compliance with 12 C.F.R. § 9.18. Upon consideration of the Wells Fargo proposal, we similarly conclude that, while the Trust's activities may not satisfy the 12 C.F.R. § 9.18(b)(12) "exclusive management" requirements, it is appropriate to allow the Trust to be administered in accordance with the Office's authority under 12 C.F.R. § 9.18(c)(5).

The exclusive management provisions of 12 C.F.R. § 9.18(b)(12) are designed generally to ensure that a national bank fiduciary has the requisite authority to administer a collective fund in satisfaction of all its fiduciary responsibilities, and to prevent delegations or reservations of authority which interfere with the bank's fulfillment of these responsibilities. While Wells Fargo is sole Trustee and investment adviser to the Trust and hence has the authority to make all investment decisions for the Trust, the Trust's supervisory committee has ultimate control over, and responsibility for, the affairs of the Trust.

Nevertheless, we believe that the nature of the Trustee's relationship with the trust in this case is such that the Trustee has been accorded substantial management of the Trust and that, pursuant to 12 C.F.R. § 9.18(c)(5), the Trust may be permitted to operate in compliance with 12 C.F.R. § 9.18. In this regard, investment decision-making authority for the Trust is vested in the Trustee and may be exercised without the prior approval of the Trust's supervisory committee. Further, the Bank, as Trustee, serves in a number of capacities, including those of investment adviser, administrator, custodian and transfer agent to the Trust. Moreover, the Bank has clear responsibilities for all of the day-to-day activities of the Trust, and generally can be held fully accountable for actions taken in contravention of its fiduciary responsibilities. *See* pp. 16-17 *infra*. These facts and circumstances, in our view, adequately ensure that the Trustee's management responsibilities currently are sufficient to allow it to exercise substantially its fiduciary responsibilities, regardless of the Trust supervisory committee's ultimate oversight responsibilities. Should these facts and circumstances change, however, *i.e.*, should the Trust supervisory committee remove Wells Fargo as Trustee or investment adviser, this Office reserves the right to withdraw the 12 C.F.R. § 9.18(c)(5) approval granted herein.

Further, a bank administering a collective investment fund must cause a periodic audit of the fund to be made by auditors responsible only to the board of directors of the sponsoring bank. 12 C.F.R. § 9.18(b)(5)(i). The Trust Agreement establishing the Trust provides that the Bank will periodically cause an audit of the Fund to be conducted by independent certified public accountants responsible only to the Trust's supervisory committee, in accordance with the Investment Company act and rules thereunder. As indicated above, only a minority of the members of the supervisory committee are affiliated with the Bank. The Bank, however, as Trustee, will make all reports required by law or by the supervisory committee. Provided that the Bank also will have access, through the affiliated members of the supervisory committee, to the results of the periodic audits of the Trust,

we believe, pursuant to 12 C.F.R. § 9.18(c)(5), that the auditing procedures of the Trust are acceptable for purposes of 12 C.F.R. § 9.18(b).

B. Compliance with Glass-Steagall Act Requirements

We are asked to consider whether the Trust's activities may be conducted in compliance with relevant provisions of the Glass-Steagall Act. Specifically, Section 16 thereof (24 U.S.C. § 24 (Seventh)), states that a national banking association may not, except as otherwise explicitly provided, buy and sell "securities and stock" for its own account, and "shall not underwrite any issue of securities or stock. . . ." By the same token, Section 21 (12 U.S.C. § 378) provides that it is unlawful "[f]or any person, firm, corporation . . . engaged in the business of issuing, underwriting, selling or distributing, at wholesale or retail . . . stocks, bonds, debentures, notes or other securities, to engage at the same time in the business of receiving deposits . . . ." The issue presented by the Wells Fargo application, therefore, is whether the activities of the Trust are proscribed by Sections 16 and 21 of the Glass-Steagall Act.[4]

This Office previously has determined that "there is no Glass-Steagall Act impediment to a bank collectively investing IRA trust assets." *Citibank Decision*, at 7. We stated that our conclusion is supported by the Supreme Court's decision in *ICI v. Camp*, which distinguished between the offering of traditional fiduciary services by a bank on the one hand, and the promotion of commingled agency accounts on the other hand, for purposes of the Glass-Steagall Act. *Citibank Decision*, at 7, 8-11. We further observed that the collective trust vehicle approved in the

4. We need not consider the applicability of Sections 20 and 32 of the Glass-Steagall Act (12 U.S.C. § § 378 and 78), generally prohibiting affiliations and management interlocks between banks and firms engaged "principally" and "primarily" in the investment banking business, respectively, inasmuch as, among other things, it should follow that the Trust's activities would not be proscribed by Sections 20 and 32 if they pass muster under the provisions of Sections 16 and 21. *See Board of Governors of the Federal Reserve System v. Investment Company Institute*, 450 U.S. 46, 58 n.24, 64 (1981).

Citibank Decision was essentially a traditional banking service expressly confirmed by the Congress in ERISA and thus that it would be inappropriate to conclude that this sort of activity was proscribed by the Glass-Steagall Act. *Id.*

We have closely examined the Wells Fargo request, and carefully analysed the materials submitted by the Bank in support of its request, and conclude that the proposed Wells Fargo Trust similarly represents the offering of a bona-fide fiduciary service expressly authorized by the Congress in ERISA. Accordingly, we conclude that the Trust's activities are consistent with the provisions of the Glass-Steagall Act and relevant case law. *ICI v. Camp, supra.*

Our conclusion regarding the *bona fides* of the fiduciary services proposed to be offered by Wells Fargo is supported first by the nature of the relationships between Wells Fargo and the Trust, and Wells Fargo and individual IRA participants, created by the Trust Agreement and relevant governing instruments. Under California law,[5] a valid express trust is created when the following elements exist: (i) a competent trustor, (ii) a trustor intent to create a trust, (iii) a trustee, (iv) an estate conveyed to the trustee, (v) acceptance of the estate by the trustee, (vi) a beneficiary, (vii) a legal purpose, and (viii) a legal term. Calif. Civil Code §§ 2216, 2218-19, 2221-22. *See, e.g., In re Johnson's Estate*, 303 P.2d 1 (Cal. 1965); *Reagh v. Kelley*, 89 Cal. Rep. 425, 10 C.A.3d 1082 (Cal. App. 1970); *Williams v. Miranda*, 323 P.2d 794 (Cal. App. 1965). Because the Wells Fargo Trust Agreement and qualified IRA trust agreements contain these elements, we are satisfied that the Trust and participating IRA trusts are valid trusts under California law. Similarly, the Trust satisfies applicable California law governing the establishment of a common trust fund. *See* Calif. Fin. Code § 1564. Accordingly, under the terms of 12 U.S.C. 92a, Wells Fargo is empowered to offer the fiduciary services represented by the Trust.[6]

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5. The terms of a trust instrument made and performed in California are governed by California law. *Desser v. Bank of America National Trust and Savings Association*, 353 F.2d 468 (9th Cir. 1965).

6. See p. 7 *supra*.

I.R.C. § 408(a) defines an "individual retirement account" as "a trust created or organized in the United States for the exclusive benefit of an individual or his beneficiaries" pursuant to a written governing instrument meeting certain requirements. Inasmuch as the Trust and the qualified IRA trusts on their face appear to be bona fide trusts, and contain the terms required by I.R.C. § 408(a), they satisfy the establishment requirements of I.R.C. § 408 governing IRA trust accounts. In turn, because the qualified IRA trusts participating in the Trust have been established in compliance with I.R.C. § 408 and hence are eligible for commingling under I.R.C. § 408(a)(5), we are satisfied that the Trust represents exactly that sort of IRA commingling activity sanctioned by the Congress in ERISA. *See* H. R. No. 93-1280, 93d Cong., 2d Sess. (1974), *reprinted in* [1974] U.S. Code Cong. & Admin. News 5116-5117; *Citibank Decision*, at 2-6.[7]

Because the Trust, and participating IRA trusts, have been established as trusts under California law, and in compliance with I.R.C. § 408, the Bank is subject to significant obligations as Trustee of the Trust and the qualified IRA trusts. Among other things, Wells Fargo will be subject to strict requirements of California law obligating the Bank to administer the Trust and qualified IRA trusts for the exclusive benefit of the Trust participants, and broadly prohibiting trustee self-dealing, undisclosed adverse interests, transactions involving undue influence on the part of a trustee, and fraudulent trustee conduct. Calif. Civil Code §§ 2228-2239. *See also* Calif. Civil Code § 2261. *See generally* Restatement (Second) of Trusts §§ 169-185 (1959). In addition, the Bank, as Trustee, is subject to relevant provisions of the I.R.C. and regulations promulgated thereunder, governing, among other things, prohibited transactions by "disqualified persons" (which include fiduciaries). *See* I.R.C. § 4975. These provisions effectively limit the Bank's ability to use Trust assets

7. The Trust has sought a ruling from the Internal Revenue Service that it is eligible for treatment under I.R.C. § 584 as a common trust fund. The common trust fund qualification, however, is not required for the trust to operate in compliance with I.R.C. § 408. *See* I.R.C. § 408(a)(5).

to, among other things, purchase its own securities or deposit instruments, to lend or borrow money from the Trust, or otherwise apply trust assets to purposes other than those exclusively benefiting its participants. Similar restrictions are imposed by this Office's fiduciary regulations. *See* 12 C.F.R. §§ 9.12, 9.18(b)(8).[8] Weils Fargo has indicated its intention to comply with the above-mentioned provisions of law.

The *bona fides* of the Trust fiduciary relationships is further demonstrated by the purposes for which an individual trustor establishes an IRA trust. The participant is not seeking short-term investment profit but instead is seeking preservation and management of assets that will be available only to the participant when the participant reaches age 59½, or to the participant's beneficiaries in the event of death, unless the participant is willing to incur substantial tax penalties. *See* I.R.C. § 408(f). Further, the participant's interest in the IRA trust or the investment fund is not transferable except by death. *See* I.R.C. § 408(a). Accordingly, there is nothing either in the terms or purposes of the Trust or qualified IRA Trusts to suggest that they should be treated as anything other than bona fide trust relationships for purposes of our analysis,[9] and we conclude that on the face of the trust relationships established, the Trust represents a bona fide fiduciary service not subject to the Glass-Steagall Act. *ICI v. Camp*, 401 U.S. 624-25, 638.

Continuing our inquiry further, we find that, as was the case with the Citibank collective investment fund, the hazards and potential abuses created when a commercial bank enters the investment banking business, and against which Congress sought

8. California Financial Code § 1591 also prohibits the commingling of corporate assets and trust funds or the use of trust funds in the conduct of corporate business, and makes knowing violations of this section by any bank officer a felony.

9. We have no reason to believe that the federal judiciary would not treat IRA trust accounts as true fiduciary relationships between financial institutions and individuals. *See, e.g., In re Dunn*, 5 Bankr. Rep. 156 (U.S. Bankr. Ct., N.D. Tex. 1980).

to legislate in the Glass-Steagall Act,[10] do not exist or are negligible in the instant application. *See Citibank Decision*, at 9-11. As we noted therein, the purpose and nature of the collective investment of IRA assets, together with the restrictions of the I.R.C. and 12 C.F.R. Part 9, reduce the danger of promotional abuses identified by the Court in *ICI v. Camp*. Moreover, we can identify features of the Wells Fargo application which further reduce potential Glass-Steagall Act hazards. Among other things, because of restrictions contained in California and federal law, the Trust will not be promoted as the type of collective investment vehicle prohibited by the Glass-Steagall Act. As noted above, relevant provisions of California fiduciary law broadly prohibit any Trustee activities which conflict or otherwise are inconsistent with the interests of the Trust participants. By the same token, under federal law (I.R.C. § 408(e)-(f)) and the Trust Agreement, contributions to IRAs and distributions of IRA assets are subject to significant tax-oriented limitations; although assets of an IRA may, under certain conditions, be redirected to another investment option or another IRA trustee, continuous, high-volume Unit redemptions are not expected to occur.

Accordingly, it would appear that relevant state fiduciary provisions (as well as 12 C.F.R. Part 9) will substantially control the types of hazards identified in *ICI v. Camp*. Similarly, while the Trust Units are, in one sense, freely purchased or redeemed, the tax disincentives built into premature redemptions effectively limit potential promotional pressures on the Bank. Of equal significance is the fact that the Trust will be promoted as part of a total IRA program offered by Wells Fargo, *i.e.*, merely one of

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10. In *ICI v. Camp*, the Court identified these hazards and abuses as involving: (i) identification in the public's mind of the bank's reputation with that of a securities firm, with possible erosion of public confidence in the bank if the securities firm fared badly; (ii) the temptation to support the securities firm with unsound loans; (iii) the temptation to make improvident loans to securities issuers in whose securities the bank or its securities affiliate had invested; (iv) the temptation to make loans to customers to purchase securities of issuers whose securities the bank or its affiliate was underwriting; and (v) the interference by the bank's securities business with the bank's ability to provide disinterested investment advice. 401 U.S. at 630-33.

several individual retirement options available to its customers, and not as a new and separate collective vehicle for the investment of non-fiduciary assets. In addition, Wells Fargo has represented that it will not promote the availability of loans from its credit department for the purpose of funding an IRA.

In sum, the legal nature of the Trust and qualified IRA trusts, coupled with the restrictions on the promotion and availability of the Trust for general investment purposes, plainly distinguishes the Trust from the type of managed agency collective account vehicle prohibited under the Glass-Steagall Act. *ICI v. Camp*, 401 U.S. at 638. As the Supreme Court observed, "[T]here is a plain difference between the sale of fiduciary services and the sale of investments." *Id.* *See also Citibank Decision*, at 6-11. That plain difference has been established to our satisfaction with respect to the type of service being offered by Wells Fargo through the Trust, and we conclude that the Trust may operate in compliance with Sections 16 and 21 of the Glass-Steagall Act.

Our Conclusion is not affected by the fact that Wells Fargo has chosen to register the Trust, and participations therein, with the SEC under the Investment Company Act and Securities Act, respectively. As noted above, Wells Fargo has selected this course of action in light of past SEC and SEC staff interpretations regarding the availability of certain exemptions under these statutes for, among other things, common trust funds and collective pension, profit sharing and retirement accounts (and interests in such funds and accounts).[11] Whatever the merits of the SEC's positions, which were discussed at length in the *Citibank Decision* (at pp. 11-18), the requirements of the Securities Act and the Investment Company Act have no significant relevance to the issue at hand, *i.e.*, whether the Wells Fargo Trust represents the offering of a bona fide fiduciary service under the Glass-Steagall Act. In addition, we note that the scheme of federal securities regulation, directed towards the protection of investors,

11. *See, e.g.*, Section 3(2) of the Securities Act (15 U.S.C. § 77c(2)); Sections 3(c)(3) and 3(c)(11) of the Investment Company Act (15 U.S.C. §§ 80a-3(c)(3) and 80a-3(c)(11)).

differs significantly in purpose and function from the Glass-Steagall Act, a statutory scheme designed to protect the interest of bank depositors and the safety and soundness of the banking system, and the administration of which in this case is the statutory responsibility of this Office. In light of the foregoing, it is sufficient to note that the SEC's positions with respect to relevant provisions of the federal securities laws are not inconsistent with our conclusion that the Wells Fargo Trust is a bona fide fiduciary service which complies with applicable provisions of the Glass-Steagall Act. *See A.G. Becker Incorporated v. Board of Governors of the Federal Reserve System*, 693 F.2d 136 (D.C. Cir. 1982), *petition for cert. granted sub nom. Securities Industry Association v. Board of Governors of the Federal Reserve System*, __ U.S. __, 104 S. Ct. 65 (1983).

Conclusion

Upon extensive and considered analysis of the request and supporting materials submitted by the Bank, we have concluded that the activities of the Trust, as described above and in the materials submitted, represent a bona fide fiduciary service which complies, with the permission granted herein pursuant to 12 C.F.R. § 9.18(c)(5), with the requirements of 12 U.S.C. § 92a and 12 C.F.R. Part 9 promulgated thereunder, and also complies with relevant provisions of the Glass-Steagall Act. Accordingly, for the reasons stated above, it is our opinion that the Bank may lawfully offer this fiduciary service.

/S/ H. JOE SELBY

H. Joe Selby
Senior Deputy Comptroller for
Bank Supervision

Dated: January 27, 1984

[Reprinted]

Comptroller of the Currency
Administrator of the National Banks

Washington, D.C. 20219

January 31, 1984

Mr. John H. McGuckin, Jr.
Vice President and Associate Counsel
Bank of California, N.A.
P.O. Box 45000
San Francisco, California 94145

Dear Mr. McGuckin:

This is in response to your various letters of last Fall regarding the bank's planned offering of collective investment to IRA customers. The bank's program, involving four separate Investment Portfolios, is quite similar to the previously-approved IRA programs of other banks. *See Decision of the Comptroller of the Currency on the Application by Citibank, N.A. , Pursuant to 12 C.F.R. § 9.18(c) (5) to Establish Common Trust Funds for the Collective Investment of Individual Retirement Account Trusts Exempt from Taxation under Section 408 of the Internal Revenue Code of 1954* (October 31, 1982); *Decision of the Office of the Comptroller of the Currency on the Application by Wells Fargo Bank, N.A. to Establish a Common Trust Fund for the Collective Investment of Individual Retirement Account Trust Assets Exempt from Taxation under Section 408 of the Internal Revenue Code of 1954, as Amended* (January 27, 1984). The Office is of the view that the activities described in your letters and attachments thereto constitute bona fide fiduciary activities which comply with the requirements of 12 C.F.R. Part 9 and are not inconsistent with the requirements of the Glass-Steagall Act, specifically 12 U.S.C. §§ 24 (Seventh), 377, 378 and 78.

This Office has carefully considered the features of the bank's collective trust and the participating IRA trusts. In two respects,

the bank's collective trust appears to deviate from the requirements of 12 C.F.R. § 9.18(b). The pertinent provisions require the bank to exercise exclusive management over its collective investment funds and require the outside auditors to be responsible solely to the bank's board of directors. See 12 C.F.R. §§ 9.18(b)(5)(i), 9.18(b)(12). Both provisions conflict with aspects of the IRA program which arise out of the bank's decision to register the collective trust with the Securities and Exchange Commission as an "investment company" under the Investment Company Act of 1940, 15 U.S.C. §§ 80a-1 *et seq.*

For the reasons set forth in the above-cited Decisions, which are equally applicable to the bank's IRA program, this Office grants permission pursuant to 12 C.F.R. § 9.18(c)(5) for the bank to operate the proposed collective trust. As with the previous applications by other banks, the Office reserves the right to rescind this approval should the supervisory committee of the bank's collective trust interfere with or terminate the management duties of the bank as trustee and investment adviser to the collective trust.

Very truly yours,

/S/ H. JOE SELBY

H. JOE SELBY
SENIOR DEPUTY COMPTROLLER FOR
BANK SUPERVISION

[Reprinted]

Comptroller of the Currency
Administrator of the National Banks

Washington, D.C. 20219

DECISION OF THE COMPTROLLER OF THE CURRENCY ON THE APPLICATION BY CITIBANK, N.A., PURSUANT TO 12 C.F.R. § 9.18(c)(5) TO ESTABLISH COMMON TRUST FUNDS FOR THE COLLECTIVE INVESTMENT OF INDIVIDUAL RETIREMENT ACCOUNT TRUST EXEMPT FROM TAXATION UNDER SECTION 408 OF THE INTERNAL REVENUE CODE OF 1954.

DECISION

Background

Citibank, N.A., ("Bank") proposes to establish common trust funds for the collective investment of individual retirement account trusts ("IRA trusts") which are exempt from taxation under Section 408 of the Internal Revenue Code of 1954 ("I.R.C."). The Bank would act as trustee of the individual IRAs and, as trustee, would be directed to invest the IRA trust assets in a common trust fund or funds maintained by the Bank. It intends to register the funds with the Securities and Exchange Commission ("SEC") under the Investment Company Act of 1940 ("Investment Company Act") and to register the offering of interests in the funds under the Securities Act of 1933 ("Securities Act"). The Bank would, as trustee, perform the functions of investment adviser, administrator, custodian and transfer agent of the fund pursuant to an agreement with them and comply with all applicable provisions of the Securities Act and the Investment Company Act. It is because some requirements of these laws might arguably conflict with certain provisions of 12 C.F.R. § 9.18(b) generally applicable to bank collective investment funds that the Bank is requesting that the Office, pursuant to 12 C.F.R. § 9.18(c)(5), waive the applicability of the provisions of

12 C.F.R. § 9.18(b) to the extent necessary to permit compliance with the Securities Act and the Investment Company Act.

Power of National Bank to Collectively Invest IRA Trust Assets

The regulations of this Office relating to the collective investment of trust funds, 12 C.F.R. § 9.18, permit IRA trust assets to be collectively invested by national banks acting as fiduciaries. The regulations generally establish two situations in which it is permissible to collectively invest funds: (i) under 12 C.F.R. § 9.18(a)(1), a bank acting as trustee or in a similar fiduciary capacity may invest the funds held in that capacity in a common trust fund; and (ii) under 12 C.F.R. § 9.18(a)(2), a bank as fiduciary may invest in a fund consisting solely of assets of retirement or similar trusts exempt from federal income taxation. Retirement fund assets are not precluded from investment in a common trust fund. 12 C.F.R. § 9.18(b)(2). As discussed below, it is readily apparent that a national bank receiving IRA trust assets does so in the capacity of trustee; it is also obvious that IRA trusts are retirement plans exempt from federal income tax. Thus, IRA trust assets may, pursuant to the Comptroller's regulations, be commingled in either a § 9.18(a)(1) or § 9.18(a)(2) fund.

The power of a national bank acting as trustee for IRA trusts to commingle the trust assets was confirmed in the Employee Retirement Income Security Act of 1974 ("ERISA") and in its legislative history. It was ERISA that essentially created the concept of IRAs by providing special tax treatment for retirement trusts established by persons not covered by employer-sponsored qualified retirement plans.

The term "individual retirement account" is defined as "a trust created or organized in the United States for the exclusive benefit of an individual or his beneficiaries" pursuant to a "written governing instrument" meeting certain requirements. I.R.C. § 408(a). (Custodial and annuity accounts are covered by special provisions not relevant here.) One of the requirements is

that the trustee be a bank or some other party able to demonstrate to the satisfaction of the Secretary of the Treasury its ability to meet similar fiduciary standards. I.R.C. § 408(a)(2). Another requirement is that the assets not be permitted to be commingled "except in a common trust fund or common investment fund." I.R.C. § 408(a)(5). The power to further commingle the assets of IRA trusts in a fund containing assets of plans exempt from taxation under I.R.C. § 401(a) is conferred by I.R.C. § 408(e)(6).

The House Report clearly indicates the Congressional understanding about the nature of IRA trusts.

> [A]n individual retirement account generally is to be a *domestic trust* created or organized by a written instrument for the exclusive benefit of an individual or his beneficiaries. . . . The balance in an individual retirement generally may be invested in any assets that are acceptable investments for a qualified plan. . . . However, account assets generally are not to be commingled with other property except *in a common trust fund*. . . . Under the governing instrument, *the trustee of an individual retirement account generally is to be a bank*.

H. R. Rep. No. 93-807, 93d Cong., 2d Sess. (1974), *reprinted in* [1974] U.S. Code Cong. & Ad. News 4797-98 (emphasis added). While the House bill was not the version ultimately adopted, its provisions relating to individual retirement accounts were not materially altered in the final version. Thus, the Conference Report notes:

> Under the conference substitute, the assets of an individual retirement account *may be invested in a trusteed* or custodial *account with a bank*, savings and loan, or credit union, or in an annuity or in a qualified retirement bond. . . . [T]he assets of an individual retirement account may not be commingled with other property, except *in a common trust fund*. . . . [T]his legislation . . . is not to limit in any way the application of the Federal securities laws to individual retirement accounts *or the application to them of the laws relating to common trusts* or investment funds maintained by any institution.

H. Conf. Rep. No. 93-1280, 93d Cong., 2d Sess. (1974), *reprinted in* [1974] U.S. Code Cong. & Ad. News 5116-17 (emphasis added). The Conference Report did expand the investment choices available to persons establishing individual retirement accounts by permitting the use of custodial accounts, annuity contracts, and qualified bonds. But what is significant here is that it continued the authorization for the use of trust accounts with bank trustees authorized to commingle the funds in common trust funds subject to all laws generally applicable to common trust funds.

Accordingly, the overwhelming conclusion to be drawn from ERISA and its legislative history is that Congress believed it to be within the power of banks to serve as trustees for IRA trusts and to collectively invest the assets of these trusts in common trust funds or in collective investment funds for retirement plan assets.

Glass-Steagall Act Consideration

Having determined that collectively investing the assets of IRA trusts is a permissible trust service sanctioned by statute and the Comptroller's regulations, it is necessary to determine whether sections 16, 20, 21 or 32 of the Banking Act of 1933 (12 U.S.C. §§ 24(Seventh), 377, 378 and 78, respectively, (commonly referred to collectively as the "Glass-Steagall Act") impose any impediment to a bank offering these fiduciary services.

We have concluded that there is no Glass-Steagall Act impediment to a bank collectively investing IRA trust assets. Among other things, the decision of the Supreme Court in *Investment Company Institute v. Camp*, 401 U.S. 617 (1971) ("*ICI v. Camp*") supports the conclusion that the prohibitions of the Glass-Steagall Act do not apply to a bank's collectively investing IRA trust assets in the manner proposed here. As discussed below, *ICI v. Camp* recognized that banks have traditionally commingled trust assets, thereby distinguishing the offering of such fiduciary services from the commingled agency account in that case. Furthermore, the fiduciary services being considered

here do not present the hazards and potential abuses which Congress sought to avoid when it enacted the Glass-Steagall Act.

In *ICI v. Camp*, the Supreme Court held that the marketing and sale of securities representing interests in collectively invested assets held by a national bank in managing agency accounts violated the Glass-Steagall Act. Certain general similarities may be seen between the fund in that case and the proposed collective investment of IRA trust assets considered here. In particular, the plan in each instance involves a fund which would be registered under the Investment Company Act and interests in such fund which would be registered as securities under the Securities Act. In addition, each plan involves the collective investment of participants' assets in a fund maintained for the benefit of the participants, as opposed to third-party beneficiaries. But the similarities end there.

The differences between the two plans are highly significant in terms of analysis of the applicability of the Glass-Steagall Act. The most significant difference is that the commingling of managing agency accounts discussed in *ICI v. Camp* did not involve the receipt by the bank of assets in trust. Rather, the assets were received in a managing agent capacity. 401 U.S. at 622 n.8. The Court noted that serving as a managing agent was a legitimate fiduciary function for bank trust departments but went on to find that the collective investment of the assets of those accounts, when marketed to the general public as investment vehicles registered pursuant to federal securities laws, violated the prohibitions in sections 16 and 21 of the Glass-Steagall Act, relating to underwriting, issuing, selling and distributing securities. In its discussion, however, the Court noted that "[f]or at least a generation . . . there has been no reason to doubt that a national bank can, consistently with the banking laws, commingle trust funds." 401 U.S. at 624. Since the IRA assets in the present case will be received by the Bank as trustee, in both a common-law sense and within the meaning of ERISA, the collective investment of IRA trust assets (and marketing of such fiduciary services to the

extent allowable under applicable laws and regulations) is clearly sanctioned by the statement of the Court in *ICI v. Camp.*

The analysis under the Glass-Steagall Act requires further consideration in this case, however, in light of the fact that the IRA trusts (and participations in the fund) will be offered as "securities" registered pursuant to the Securities Act. The Court's conclusion in *ICI v. Camp* was that the issuance and sale of securities by a bank violated the Glass-Steagall Act where the securities represented a nontraditional banking service and where, in the Court's view, certain potential abuses that Congress sought to avoid by the enactment of the Glass-Steagall Act were present. This Office has viewed the meaning of the term "securities" under the securities laws as not necessarily synonomous with its meaning under the Glass-Steagall Act. In particular, when, as in the present case, the "securities" merely represent the formal manifestation of a traditional banking service, it is the Office's opinion that the prohibitions of the Glass-Steagall Act are not applicable. Nevertheless, since the Bank's fiduciary service will be offered in this manner, it may be appropriate to assess the transaction in terms of the hazards and potential abuses identified by the Court in *ICI v. Camp.*

The Court indicated that Congress was concerned primarily with promotional pressures and certain attendant hazards and potential abuses arising from the investment banking business. In particular, these abuses involved (1) identification in the public's mind of the bank's reputation with that of a securities firm, with possible erosion of public confidence in the bank if the securities firm fared badly; (2) the temptation to support the securities firm with unsound loans; (3) the temptation to make improvident loans to securities issuers in whose securities the bank or its securities affiliates had invested; (4) the temptation to make loans to customers to purchase securities of issuers whose securities the bank or its affiliate was underwriting; (5) the interference by the bank's securities business with its ability to provide disinterested investment advice. 401 U.S. at 630-33. Each of the

enumerated potential abuses is nonexistent or negligible in the context of commingled IRA trusts.

For example, the Bank's reputation could conceivably be affected in some measure by the performance of its IRA trust fund, but in view of the absence of any current adverse effects on the reputation of banks arising from their significant involvement in the collective investment of pension fund assets, it is difficult to treat this as a real concern. The concerns relating to pressures to make improvident loans are similarly misplaced. The Bank would be barred by I.R.C. § 4975 from lending to the trust. And in light of the annual contributions limitations for investment in IRA trusts, it is unlikely that the Bank would be lending to the fund participants for this purpose. Finally, in the case of a highly diversified fund, it seems implausible that the Bank would be tempted to lend to any issuer whose securities are held by the fund merely to support the fund. The insulation of the trust department from confidential information obtained in the commercial lending business further reduces the likelihood of this hazard. *Cf.* 12 C.F.R. § 9.7(d). And with regard to providing investment advice, the same rationale concerning diversification of investment makes it implausible that the Bank would be tempted to render anything but disinterested advice. In any event, the potential for conflicts of interest and other abuses cited in *ICI v. Camp* are not any more present when a bank administers collectively invested IRA trust assets than when a bank engages in its customary fiduciary functions. Accordingly, because the potential for abuse is nonexistent or negligible here, and because this is essentially a traditional banking service, it would be inappropriate to conclude that there is any security here for purposes of the Glass-Steagall Act.

Considerations Relating to the Federal Securities Laws

A review of the current treatment accorded collectively invested IRA trust assets under the federal securities laws is instructive, particularly where, as apparently is the case here, a bank in an abundance of caution elects registration under the

Investment Company Act and the Securities Act rather than pursuing exemptions which are available to bank common trust funds and collective investment funds for tax-exempt pension plans, as well as the interests in such funds. Among other things, it underscores the essential similarities between collectively invested IRA trust assets and traditional banking services exempt under those Acts.

The SEC has, in a series of interpretive letters, generally maintained that no exemption from registration under the Securities Act and the Investment Company Act is available where a bank seeks to collectively invest IRA trust assets as proposed here. *See* Continental Bank of Norristown, Pa. (pub. avail. Sep. 2, 1982); United Missouri Bank of Kansas City, N.A. (pub. avail. Dec. 31, 1981); Owensboro National Bank (pub. avail. July 29, 1981); Citytrust (pub. avail. Mar. 9, 1980); The Millikin National Bank of Decatur (pub. avail. April 1, 1979); Continental Illinois National Bank and Trust Co. of Chicago (pub. avail. April 28, 1975). *See also,* SEC Release No. 33-6188 (Feb. 1, 1980). This position has been asserted despite two exemptions under each Act that arguably should apply: the exemption for common trust funds maintained by banks and the exemption for collective investment funds for certain tax-exempt pension plans. 15 U.S.C. § 77c(a)(2); 15 U.S.C. § 80a-3(c)(3) and (11). Because of the SEC's unwavering position in this regard, the Bank has determined that it should register its fund and the participating IRA trusts under the securities laws.

With respect to the common trust fund exemption, the SEC has steadfastly maintained that it is available only for participation in funds maintained by a bank for "bona fide fiduciary purposes." The SEC contrasts with this the notion of public investment vehicles. For support, the SEC cites the legislative history of the Investment Company Act Amendments of 1970 ("1970 Amendments") in which both houses of Congress stated that the exemption applies to "traditional common trust funds maintained by banks as investment vehicles for the assets held by the bank in a bona fide fiduciary capacity. . . . [I]t would not exempt interests

or participations in bank funds maintained as vehicles for direct investment by individual members of the public." *H.R. Rep. No.* 1382, 91st Cong., 2nd Sess. 43 (1970); *S. Rep. No.* 184, 91st Cong., 1st Sess. 27 (1969). The problem with the SEC's reliance here is twofold. First, as discussed above, the Bank is accepting IRA trusts in a traditional, bona fide fiduciary capacity—*i.e.*, as trustee. Second, the fund is not a vehicle maintained for "direct investment" by the public but is, instead, an investment vehicle for the Bank as trustee of IRA trusts, precisely the thing contemplated as exempt in the reports cited above. *Cf. International Brotherhood of Teamsters* v. *Daniel*, 439 U.S. 551, 565 (1979).

The *bona fides* of the fiduciary relationship can easily be seen from the purpose of establishing or augmenting an IRA trust. The participant is not seeking short-term investment profit but, instead, is seeking preservation and management of assets that will be available only to the participant when the participant reaches age 59½, or to the participant's beneficiaries in the event of death, unless the participant is willing to incur substantial tax penalties. Further, the participant's interest in the IRA trust or the investment fund is not transferrable except by death.

The other exemption often cited in this context covers certain tax-exempt pension interests. The SEC has repeatedly denied the availability of this exemption on the grounds that it applies to interests in funds for pension plans exempt from taxation under I.R.C. § 401, whereas IRA trusts are exempt from taxation under I.R.C. § 408, an assertion that clearly is true on the face of the statute. In this regard, the SEC cites the legislative history of ERISA referred to above and certain language in a 1975 Study Outline prepared by a Senate subcommittee. The legislative history of ERISA does include the statement that the "legislation . . . is not to limit in any way the application of the Federal Securities laws to individual retirement accounts, but there is no indication that the conference committee meant this to include the registration requirements of the Securities Act or the Investment Company Act. Rather, the conference committee could

have intended only that the antifraud provisions of the securities laws would be applicable or, more likely, that they were not expressing any view as to the applicability of the securities laws. Yet another interpretation could be that the committee intended the securities laws to be applicable if the pension fund or common trust fund exemption was not available—*i.e.*, if the trustee was not a bank. In any event, the rather cryptic sentence is capable of multiple interpretations that would not preclude the availability of the various exemptions.

A more direct statement cited by the SEC is contained in a 1975 Study Outline on The Securities Activities of Commercial Banks prepared by the Subcommittee on Securities of the Senate Banking, Housing and Urban Affairs Committee. The Outline, at 13, notes that "because IRA's are not trusts described in Section 401 of the Code, IRA's and collective investment funds for IRA's clearly are not exempt from registration under the Investment Company Act of 1940 and the Securities Act of 1933." The statement does support the SEC's view. However, it was not made in the context of any legislative action; it was not made contemporaneously with the passage of ERISA; it was not made by the Senate committee responsible for ERISA; it was not even made by a full Senate committee. What is more significant is that it was really only a tentative view expressed by the subcommittee, since in soliciting comments the Outline specifically had asked, among other things, "3. Are banks precluded from investing IRA assets in any collective fund unless it is registered under the Investment Company Act of 1940? Under the Securities Act of 1933?" *Id.* at 14.

Further, the subcommittee reprinted lengthy materials submitted by Messrs Mayer, Brown & Platt as counsel to Continental Illinois National Bank and Trust Company of Chicago (Continental). The Continental materials are instructive in several respects. They contain counsel's analysis of why the § 401 plan exemption should be applicable and the SEC's rejection of that argument. With regard to the Investment Company Act, counsel noted that the 1970 Amendments, providing an exemption for

§ 401 plans, merely restated the SEC's interpretive position that, even in the absence of specific statutory language, tax-exempt pension trusts were not required to be registered as investment companies. The 1970 legislation codified this prior to the creation of tax-exempt IRA trusts in 1974. The fact that Congress granted the tax exemption under new I.R.C. § 408 should not have altered the Investment Company Act exemption. A similar view of the scope of roughly comparable amendments in 1970 to the Securities Act of 1933 was enunciated by the Court in *International Brotherhood of Teamsters* v. *Daniel*, 439 U.S. 551, 564-65 (1979). The § 401 plan exemption was created, in the Court's view, so that pension plans purchasing excess amounts of employer securities *"and only such plans"* were required to be registered. 439 U.S. at 565 n.19 (emphasis added).

Continental also urged the notion that the fact that I.R.C. § 408 gave the tax exemption to IRA trusts was not a conscious decision on the part of Congress vis-a-vis the securities laws. Rather, it was a drafting technique related to other technical problems in ERISA. The Senate bill on ERISA would, in fact, have deemed IRAs to be I.R.C. § 401 plans for certain cited purposes, such as the excise tax provisions of I.R.C. § 4975, but would have exempted them from certain other cited provisions applicable to qualified pension plans, such as the funding rules. The House bill ultimately used as the vehicle for ERISA adopted a different drafting technique, putting IRAs in a separate new Code section and spelling out the rules applicable to IRA trusts in that section. The SEC found these and other reasons unpersuasive and refused to grant Continental a no-action position, relying instead on the "plain language" of the exemptions.

The requirement of registration of IRA trusts or collective investment funds for them was further called into doubt by the Supreme Court's decision in the *Daniel* case referred to above. In that case the Court held that an employee's interest in a noncontributory pension plan was not even a security for the purposes of the federal securities laws. Several subsequent cases have extended this view to contributory plans. *See* Cunha v. Ward

Foods, Inc., Civ. No. (D. Ha., June 21, 1982) (mandatory employee contributions); *O'Neil* v. *Marriott Corp.*, Civ. No. (D. Md. May 11, 1982) (voluntary employee contributions); *Tanuggi* v. *Grolier, Inc.*, 471 F. Supp. 1209 (S.D.N.Y. 1979) (mandatory employee contributions); *Newkirk* v. *General Electric Co.*, 20 F.E.P. Cases 1588 (N.D. Cal. 1979) (noncompulsory contributions by employees). The SEC apparently has not been pursuaded by these lower court cases. *See* SEC Release No. 33-6188 (1980). The rationale in each case is that the protections of the securities laws are not needed, nor on their face mandated, for pension interests adequately safeguarded by other regulatory schemes. The same rationale would appear to apply here, although it is not a basis for our decision. For example, the Comptroller's rules in 12 C.F.R. Part 9, together with common law fiduciary principles, would appear to provide an adequate substitute for the securities laws in protecting participants' interests. Further, the rules on prohibited transactions contained in ERISA apply to IRA trusts and funds for their collective investment. Finally, while the fiduciary standards of Title I of ERISA are not applicable to collective investment funds containing IRA trusts only, they would apply to collective investment funds for IRA and other retirement plan assets, a type of commingling expressly contemplated by the legislative history of ERISA.

The Bank's Ruling Request

The Bank has requested, pursuant to 12 C.F.R. § 9.18(c)(5), a waiver of the applicability of those provisions of 12 C.F.R. § 9.18(b) that might be inconsistent with provisions of the Securities Act and the Investment Company Act. In particular, the only provision of 12 C.F.R. § 9.18 identified as creating a conflict is the requirement, in § 9.18(b)(12), that the Bank maintain exclusive management of collective investment funds it administers. It is not clear that this provision of § 9.18 will be violated, since, among other things, the Bank will serve at the outset as the investment adviser to the collective fund. Nevertheless, it could be argued that the Bank will not be in compliance with the

"exclusive management" requirement because of requirements in the Investment Company Act that a majority of the board or committee of directors of the fund be independent and that the board and the participants have the power to replace the investment adviser. Other provisions identified by Bank counsel, relating to fees, advertising, and evidence of ownership, do not create any apparent conflict.

We note that the SEC, pursuant to Section 6(c) of the Investment Company Act, 15 U.S.C. § 80a-6(c), may waive provisions of the Act, such as the independent board requirement of Section 10, 15 U.S.C. § 80a-10, provided it is consistent with the investor protection provisions of the Act. The SEC has, in the past, granted limited waivers to banks from the provisions of Section 10. The Bank has indicated that it prefers not to seek similar waivers from the SEC in this instance based on communications with SEC staff indicating that, among other things, the waiver process could be protracted and, quite probably, would involve extended public hearings, and further based on the bank's marketing surveys indicating the importance of offering its trust services to the public piror to year-end 1982.

Conclusion

The Office has carefully considered the legality of the activities proposed by the Bank. For the reasons presented above, it is my opinion that the Bank may offer this fiduciary service, even if registration is effected under the Investment Company Act and the Securities Act. Accordingly, on the basis of this legal analysis and our consideration of other relevant information presented by the Bank, the application is approved this day.

/s/ C. T. CONOVER

C. T. Conover
Comptroller of the Currency

Dated: 10/21/82

[Reprinted]

DECISION OF THE OFFICE OF THE COMPTROLLER OF THE CURRENCY ON THE APPLICATION BY CONNECTICUT BANK AND TRUST COMPANY, N.A., TO ESTABLISH A COMMON TRUST FUND FOR THE COLLECTIVE INVESTMENT OF INDIVIDUAL RETIREMENT ACCOUNT TRUST ASSETS EXEMPT FROM TAXATION UNDER SECTION 408(a) OF THE INTERNAL REVENUE CODE OF 1954, AS AMENDED.

Introduction

Connecticut Bank and Trust Company, N.A. ("CBT" or the "Bank") proposes to establish a collective investment trust ("Trust") for the collective investment of individual retirement account ("IRA") trust assets exempt from taxation under Section 408 of the Internal Revenue Code of 1954, as amended ("I.R.C."). CBT seeks this Office's confirmation that the Trust's activities comply with this Office's regulations governing the fiduciary powers of national banks, 12 C.F.R. Part 9, and with relevant provisions of the national banking laws, notably certain requirements of the Banking Act of 1933, as amended, 12 U.S.C. §§ 24 (Seventh), 377, 378 and 78 ("Glass-Steagall Act"). For the reasons set forth below, this Office has determined that the activities of the Trust, as hereinafter described, constitute bona fide fiduciary activities authorized to national banks under applicable laws which comply with the requirements of 12 C.F.R. Part 9 (except for certain provisions with respect to which this Office exercises its approval authority under 12 C.F.R. § 9.18(c)(5)) and are not inconsistent with the requirements of the Glass-Steagall Act.

The Trust

CBT has established the Trust under the laws of Connecticut as a trust pursuant to a Declaration of Trust ("Trust Agreement"). Under Trust Agreement, CBT will act as the exclusive trustee ("Trustee") of the Trust. The Trust Agreement provides

that CBT, as Trustee, will act as investment adviser, administrator, custodian and transfer agent to the Trust, and will have the power and authority necessary to act on behalf and for the protection of the Trust with respect to the investment, redemption, holding and distribution of trust assets; CBT, as Trustee, also has executed an investment advisory agreement with the Trust. The activities of the Trustee will be conducted under the direction of a supervisory committee of the Trust, the members of which will assume those powers and duties imposed on investment company directors under the Investment Act of 1940 ("Investment Company Act") (15 U.S.C. §§ 80a-1 *et seq.*), and a majority of whose members will not be officers, directors or employees of the Bank within the meaning of the Investment Company Act.

Under the Trust Agreement, beneficial interests in the Trust will be divided into three classes of non-transferable Units. The first series of Units will represent interests in a U.S. Government Securities Portfolio, the assets of which will be invested in a portfolio of fixed-income securities issued or guaranteed by the U.S. Government, its agencies or instrumentalities with maturities of up to seven years. It seeks to increase participating assets by providing current income and stability of principal. The second class of Units will represent interests in an Equity Growth Portfolio, the assets of which will be invested in a portfolio of equity securities or securities convertible into equity securities of mature, well-estabished, large and medium-sized companies whose securities are actively traded. It seeks to increase participating Trust assets by providing long-term capital appreciation, with current income a secondary objective. The third class of Units will represent interests in a Special Equity Portfolio, the assets of which will be invested in a portfolio of equity securities or securities convertible into equity securities of smaller and medium-sized growth-oriented companies which may not have an established long-term operating record. This Portfolio, which seeks to increase participating Trust assets by providing long-term capital appreciation, is intended for participants who can accept a somewhat higher level of risk.

Units in the Trust will be available exclusively to IRA trusts which are established with CBT in compliance with I.R.C. § 408, including simplified employee pensions created under I.R.C. § 408(j)-(k) ("qualified IRA trusts"). If, at any time, an IRA trust participating in the Trust ceases to be a qualified IRA trust, the Trust Agreement provides that the Trustee shall withdraw from the Trust all Units owned by that participating trust. Each qualified IRA participant will execute a written agreement with CBT authorizing CBT, as trustee of the IRA trust, to invest IRA assets in Trust Units in conformance with the Trust Agreement. Qualified IRA trusts may place their assets in one or more series of Trust Units, and may thereafter transfer assets from one series of Units to another. CBT has received an opinion of counsel stating that the Trust qualifies as a common investment fund under I.R.C. § 408, and has applied to the Internal Revenue Service ("IRS") for a ruling to that effect.

The Trust Agreement, Trust registration materials, and relevant provisions of federal and Connecticut laws and regulations, together impose several significant restrictions on the activities of the Trust and Trustee. Under Connecticut law, CBT, as Trustee, generally is required to administer the Trust for the exclusive benefit of the respective participants, and may not take any actions not explicitly permitted under the Trust Agreement which are inconsistent with the interests of these participants. For example, Connecticut law imposes upon the Trustee significant fiduciary duties and obligations, including the duty to obey the donor's instructions,[1] to protect the fund,[2] to exercise due diligence,[3] to be completely loyal to the interests of the beneficiaries,[4] and to avoid being influenced by any third-party or personal interest which may conflict with duties as Trustee.[5] In addition,

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1. *Conway v.Emeny*, 96 A.2d 221, 139 Conn. 612 (1953).
2. *Palmer v. Hartford National Bank & Trust Company*, 279 A.2d 726, 160 Conn. 415 (1971).
3. *McClure v. Middleton Trust Company*, 110 A. 838, 95 Conn. 148 (1920).
4. *Phillips v. Moeller*, 170 A.2d 897, 148 Conn. 361 (1961); *Conway* v. *Emeny, supra*, 96 A.2d 221, n. 11.
5. *Lyman* v. *Stevens*, 197 A. 313, 123 Conn. 591 (1938).

CBT represents that it will not promote its credit facilities to customers as a means of funding qualified IRA trusts, and qualified IRA trusts otherwise pledged or used as security for any loan will lose their qualified status under I.R.C. § 408 and hence their eligibility for participation in the Trust. The Trust also is precluded from investing in any securities or deposit instruments of CBT or its affiliates, and may not make any loans to CBT or any affiliate thereof. Moreover, CBT otherwise is precluded under this Office's regulations from having any interest in the Trust other than in its fiduciary capacity. 12 C.F.R. § 9.18(b)(8).

CBT intends to offer the Trust to IRA customers as part of a total IRA program, and will advertise the Trust as being merely one of several IRA alternatives. Specifically, CBT will offer the following IRA management alternatives: (i) CBT savings accounts; (ii) the Trust; and (iii) stocks, bonds or U.S. Treasury securities. IRA trusts will be able to select one or more of the available IRA alternatives and thereafter to transfer assets from one alternative to another. IRA trusts which participate in more than one of the CBT IRA alternatives will receive one consolidated account statement reflecting activities in each of the IRA options selected. Although CBT has established a separate schedule of fees for each of its IRA alternatives, the Bank's internal profit projections have been developed on a consolidated basis for all IRA alternatives. Accordingly, the Trust will not be marketed as a separate investment service independent of the other IRA options being offered.

In view of Securities and Exchange Commission ("SEC") and SEC staff interpretive positions concerning the applicability of the Investment Company Act and the Securities Act of 1933 (15 U.S.C. §§ 77a *et seq.*) ("Securities Act") to collective investment funds consisting of IRA trusts, CBT has determined to register the Trust with the SEC as an investment company under the Investment Company Act, and to register the Trust Units under the Securities Act, rather than undertaking the protracted process of seeking possible exemptions from these requirements.

Discussion

CBT's proposal to establish a collective fund for the collective investment of IRA trust assets is not a question of first impression for this Office. We previously have determined that the commingling of retirement trust assets by a national bank is a traditional bank fiduciary service explicitly acknowledged by this Office's fiduciary service regulations, and that the commingling of IRA trust assets was authorized by the Congress when it enacted relevant provisions of the Employee Retirement Income Security Act of 1974 ("ERISA"). *Decision of the Comptroller of the Currency on the Application by Citibank, N.A., Pursuant to 12 C.F.R. § 9.18(c)(5) to Establish Common Trust Funds for the Collective Investment of Individual Retirement Account Trusts Exempt from Taxation Under Section 408 of the Internal Revenue Code of 1954* (Oct. 21, 1982) ("*Citibank Decision*") at 2-3. This decision was challenged, and this Office's position was affirmed in *Investment Company Institute v. Conover*, 596 F. Supp. 1496 (D.D.C. 1984) ("*D.C. Opinion*"). In January 1984, this Office approved similar applications made by Wells Fargo Bank, N.A., and the Bank of California, N.A., to establish collective funds for the investment of IRA trust assets. *Decision of the Office of the Comptroller of the Currency on the Application by Wells Fargo Bank, N.A., to establish a Common Trust Fund for the Collective Investment of Individual Retirement Account Trust Assets Exempt from Taxation under Section 408(a) of the Internal Revenue Code of 1954, as amended* (January 27, 1984) ("*Wells Fargo Decision*") at 1; Letter from H. Joe Selby, Senior Deputy Comptroller, to John H. McGuckin, Esquire, Bank of California, January 31, 1984. These decisions were also challenged. A decision setting aside this Office's two rulings was issued on August 28, 1984, *Investment Company Institute v. Conover*, 593 F. Supp. 846 (N.D. Cal. 1984), and has been stayed pending appeal ("*California Opinion*").

We remain of the view previously expressed, notwithstanding the controversy that followed these earlier decisions and despite the fact that *Wells Fargo Decision* has been set aside by the

district court and is now pending appeal. As the District Court pointed out in upholding the *Citibank Decision*, the commingling of IRA trust assets by a bank through the vehicle of a common trust fund or common investment fund was expressly recognized and confirmed by the Congress in ERISA. *D.C. Opinion*, 596 F. Supp. at 1500, 1501. That same decision also affirmed that the commingling of individual retirement trust assets as part of a bona fide fiduciary service was consistent with the requirements of the Glass-Steagall Act, as stated by the U.S. Supreme Court in *Investment Company Institute v. Camp*, 401 U.S. 617 (1971) ("*ICI v. Camp*"). *D.C. Opinion*, 596 F. Supp. at 1501-1503.

A. Compliance of Trust with Supervisory Requirements Concerning the Collective Investment of Retirement Trusts By National Banks

The regulations of this Office concerning the collective investment of funds received in a fiduciary capacity are set forth in 12 C.F.R. Part 9, particularly 12 C.F.R. § 9.18. Title 12 C.F.R. Part 9 has been promulgated by this Office pursuant to the authority of 12 U.S.C. § 92a, which confers on national banks the right, subject to the approval off this Office and when not in contravention of local law, to engage in trust activities. Under these regulations, national banks are permitted to invest collectively, either by means of a common trust fund or a collective fund composed exclusively of assets of tax-exempt retirement, pension, profit-sharing, stock bonus or other similar trusts, funds received in a fiduciary capacity, subject to a number of requirements and restrictions.

This Office has examined the CBT application and supporting materials, and has determined that the administration of the Trust satisfies the requirements of 12 U.S.C. § 92a and 12 C.F.R. § 9.18, subject to certain exceptions as to which this Office exercises its administrative approval authority under 12 C.F.R. § 9.18(c)(5) in order to allow the Trust to operate. The provisions of the Trust Agreement governing, among other things, proportional interests, valuations, distributions, segregation,

expenses, and evidences of interest comply with relevant provisions of 12 C.F.R. § 9.18.[6] Because the Trust consists exclusively of retirement assets which are held by CBT, the Trust is qualified under 12 C.F.R. § 9.18(a)(2) as a collective investment trust fund not subject to the advertising restrictions of 12 C.F.R. § 9.18(b)(5). *See* Comptroller's Trust Opinion No. 9.6100. Moreover, the Trust Agreements, prohibitions on transactions between the Trust on the one hand, and CBT and its affiliates on the other hand, and restrictions on Trust borrowings and Unit pledgings, satisfy the self-dealing and conflicts provisions of 12 C.F.R. § 9.18(b)(8). *See also* 12 C.F.R. § 9.12.

One provision of 12 C.F.R. § 9.18 which raises a question regarding the Trust's compliance is the requirement of 12 C.F.R. § 9.18(b)(12), which provides that a national bank must maintain "exclusive management" of its collective investment funds. CBT, out of an abundance of caution and in order to avoid protracted hearings before the SEC on requests for exemption, has chosen to register the Trust with the SEC under the Investment Company Act,[7] which states, among other things, that no investment company may have a board of directors of which a majority are officers, directors or employees of one bank. Investment Company Act § 10(c) (15 U.S.C. § 80a-10(c)). Accordingly, the overall direction of the Trust's affairs will be under the Trust's supervisory committee, the majority of which will be unaffiliated with CBT. Consequently, it may be argued that the Trust's compliance with the unaffiliated director provisions of the

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6. CBT's fee structure for its IRA accounts will vary according to the deposit and investment options selected by the account holder. Fees charged to qualified IRA trusts participating in the Trust will be higher than those fees charged to IRA trusts which select the Bank's certificate of deposit option. The proportionate fee requirements of 12 C.F.R. § 9.18(b)(12) are satisfied, however, inasmuch as, according to CBT, the proportionate fees charged to participating IRA trusts would be much lower than any fees which would be charged to an IRA trust participant seeking to place assets in an individually-managed portfolio of securities approximating the investment strategies incorporated into the Trust Agreement.

7. *See* discussion at pp. 25-28 *infra*.

Investment Company Act is inconsistent with the "exclusive management" provisions of 12 C.F.R. § 9.18(b)(12).

We previously observed in the *Citibank Decision* that it was not clear that the Citibank collective trust approved in that decision, which also provided for a supervisory committee the majority of whose members would not be affiliated with the bank, would violate the exclusive management provisions of 12 C.F.R. § 9.18(b)(12), inasmuch as, "among other things, [Citibank] will serve at the outset as the investment adviser to the collective fund." *Citibank Decision*, at 18. Nevertheless, we determined therein that approval was appropriate pursuant to this Office's authority under 12 C.F.R. § 9.18(c)(5) to permit the Citibank collective trust to operate in compliance with 12 C.F.R. § 9.18. Upon consideration of the CBT proposal, we similarly conclude that, while the Trust's activities may satisfy the 12 C.F.R. § 9.18(b)(12) "exclusive management" requirements, it is appropriate to allow the Trust to be administered in accordance with the Office's authority under 12 C.F.R. § 9.18(c)(5).

The exclusive management provisions of 12 C.F.R. § 9.18(b)(12) are designed generally to ensure that a national bank fiduciary has the requisite authority to administer a collective fund in satisfaction of all its fiduciary responsibilities, and to prevent delegations or reservations of authority which interfere with the bank's fulfillment of these responsibilities. While CBT is sole Trustee and investment adviser to the Trust and hence has the authority to make all investment decisions for the Trust, the Trust's supervisory committee has ultimate control over, and responsibility for, the affairs of the Trust.

Nevertheless, we believe the nature of the Trustee's relationship with the Trust in this case is such that the Trustee has been accorded substantial management of the Trust and that, pursuant to 12 C.F.R. § 9.18(c)(5), the Trust may be permitted to operate in compliance with 12 C.F.R. § 9.18. In this regard, investment decision-making authority for the Trust is vested in the Trustee and may be exercised without the prior approval of the Trust's supervisory committee. Further, the Bank, as Trustee, serves in

a number of capacities, including those of investment adviser, administrator, custodian and transfer agent to the Trust. Moreover, the Bank has clear responsibilities for all of the day-to-day activities of the Trust, and generally can be held fully accountable for actions taken in contravention of its fiduciary responsibilities. *See* p.18 *infra*. These facts and circumstances, in our view, adequately ensure that the Trustee's management responsibilities currently are sufficient to allow it to exercise substantially its fiduciary responsibilities, regardless of the Trust supervisory committee's ultimate oversight responsibilities.[8] Should these facts and circumstances change, however, *i.e.*, should the Trust supervisory committee remove CBT as Trustee or investment adviser, this Office reserves the right to withdraw the 12 C.F.R. § 9.18(c)(5) approval granted herein.

Further, a bank administering a collective investment fund must cause a periodic audit of the fund to be made by auditors responsible only to the board of directors of the sponsoring bank. 12 C.F.R. § 9.18(b)(5)(i). The Trust Agreement establishing the Trust provides that the Bank will periodically cause an audit of the Trust to be conducted by independent certified public accountants responsible only to the Trust's supervisory committee, in accordance with the Investment Company Act and rules

8. The *California Opinion* rejected the Comptroller's conclusion on this point, saying that banks cannot retain exclusive fiduciary responsibility for their common trusts when they delegate "ultimate control" to outsiders. But the court failed to recognize that under the existing facts, CBT does retain "ultimate control" for purposes of Part 9, despite the composition of the Board. 593 F. Supp. at 854. The crux of the matter is that CBT, as investment adviser to the Trust, has clear responsibility for the Trust's day-to-day operation and full investment decision-making authority. The Comptroller's view as to what constitutes "exclusive management" for purposes of Part 9, a regulation which he has promulgated and has particular expertise to administer, should have been accorded greater deference by the District Court. In addition, the Court failed to recognize that the "non-affiliation" of the supervisory committee is solely the product of securities law requirements. While the *California Opinion* recognized that neither the definitions of the securities laws nor the question of registration *vel non* thereunder is dispositive of the scope of the Glass-Steagall Act (593 F. Supp. at 852-854), the Opinion in effect contradicts this view by in part basing its determination that the bank's common trusts are illegal on a factor that flows solely from securities registration.

thereunder. As indicated above, only a minority of the members of the supervisory committee are affiliated with the Bank. The Bank, however, as Trustee, will make all reports required by law or by the supervisory committee. Provided that the Bank also will have access, through the affiliated members of the supervisory committee, to the results of the periodic audits of the Trust, we believe, pursuant to 12 C.F.R. § 9.18(c)(5), that the auditing procedures of the Trust are acceptable for purposes of 12 C.F.R. § 9.18(b).

B. Compliance with Glass-Steagall Act Requirements

As we have done previously, we consider whether the Trust's activities may be conducted in compliance with relevant provisions of the Glass-Steagall Act. Specifically, Section 16 thereof (12 U.S.C. § 24 (Seventh)), states that a national banking association may not, except as otherwise explicitly provided, buy and sell "securities and stock" for its own account, and "shall not underwrite any issue of securities or stock . . . ." By the same token, Section 21 (12 U.S.C. § 378) provides that it is unlawful "[f]or any person, firm, corporation . . . engaged in the business of issuing, underwriting, selling or distributing, at wholesale or retail . . . stocks, bonds, debentures, notes or other securities, to engage at the same time in the business of receiving deposits . . . ." The issue presented by this application, therefore, is whether the activities of the Trust are prohibited by Sections 16 and 21 of the Glass-Steagall Act.[9]

This Office previously has determined that "there is no Glass-Steagall Act impediment to a bank collectively investing IRA

9. We need not consider the applicability of Sections 20 and 32 of the Glass-Steagall Act (12 U.S.C. §§ 377 and 78), generally prohibiting affiliations and management interlocks between banks and firms engaged "principally" and "primarily" in the investment banking business, respectively, inasmuch as, among other things, it should follow that the Trust's activities would not be prohibited by Sections 20 and 32 if they pass muster under the provisions of Sections 16 and 21. *See Board of Governors of the Federal Reserve System v. Investment Company Institute*, 450 U.S. 46, 58 n.24, 64 (1981).

trust assets." *Citibank Decision*, at 7. We stated that our conclusion is supported by the Supreme Court's decision in *ICI* v. *Camp*, which distinguished between the offering of traditional fiduciary services by a bank on the one hand, and the promotion of commingled agency accounts on the other hand, for purposes of the Glass-Steagall Act. *Citibank Decision*, at 7, 8-11. We further observed that the collective trust vehicle approved in the *Citibank Decision* was essentially a traditional banking service expressly confirmed by the Congress in ERISA and thus that it would be inappropriate to conclude that this sort of activity was prohibited by the Glass-Steagall Act. *Id.* Our analysis in the *Citibank Decision* was upheld in the *D.C. Opinion*, which stated that ERISA

> allow[s] the commingling of the IRA Trust assets in either a common trust or a common investment fund and that [s]such funds have long been considered traditional banking services for retirement assets, and there is a clear indication that Congress fully intended IRA assets to be invested in this manner.

D.C. Opinion, 596 F. Supp. at 1501.

In the *Wells Fargo Decision*, we considered an application substantially similar to that of Citibank, and concluded that the Wells Fargo Trust also represented the offering of a traditional fiduciary service expressly authorized by Congress in ERISA.

While the rationale on which we based this decision was not accepted in the *California Opinion*, we believe that it is supported by a strong statutory framework. It is clear, as the *D.C. Opinion* held, that the two California funds which were set aside in the *California Opinion* "were considered by Congress to be a natural extension of traditional banking activities" and therefore do not violate Glass-Steagall. *D.C. Opinion*, 596 F. Supp. at 1501. Accordingly, since the proposed activities of CBT are in all material respects identical to these others which we have previously considered and approved, we here conclude that the Trust's activities are consistent with the provisions of Glass-Steagall and relevant case law. *ICI v. Camp, supra.*

Our conclusion regarding the permissibility of the fiduciary services proposed to be offered by CBT is supported by the nature of the relationships between CBT as trustee of the Trust, and CBT as trustee of the individual IRA participants. Under Connecticut law, a valid express trust is created when the following elements exist: (i) a trustor intent to create a trust, (ii) a trustee, (iii) a trust property, which is held by the trustee for the beneficiary, and (iv) a beneficiary. *South End Bank and Trust Company v. Hurwitz*, 21 A.2d 407, 128 Conn. 204 (1941); *Marzahl* v. *Colonial Bank and Trust Company*, 364 A.2d 173, 170 Conn. 62 (1976). CBT also has provided in its opinion of counsel that the CBT Trust Agreement and qualified IRA trust agreements contain these elements. Because the Trust Agreement and the qualified IRA trust agreements contain the elements required under Connecticut law, we are satisfied as to the validity of the Trust and participating IRA trusts. Similarly, the Trust satisfies applicable Connecticut law governing the establishment of a common trust fund. *See* Connecticut General Statute § 36-83. Accordingly, under the terms of 12 U.S.C. § 92a, CBT is empowered to offer the fiduciary services represented by the Trust.[10]

Further, the CBT Trust, consisting of qualified IRA trust assets, is an activity authorized under ERISA. I.R.C. § 408(a) defines an "individual retirement account" as "a trust created or organized in the United States for the exclusive benefit of an individual or his beneficiaries" pursuant to a written governing instrument meeting certain requirements. Inasmuch as the Trust and the qualified IRA trusts on their face appear to be bona fide trusts, and contain the terms required by I.R.C. § 408(a), they satisfy the establishment requirements of I.R.C. § 408 governing IRA trust accounts. In turn, because the qualified IRA trusts participating in the Trust have been established in compliance with I.R.C. § 408 and hence are eligible for commingling under I.R.C. § 408(a)(5), we are satisfied that the Trust represents exactly that sort of IRA commingling activity sanctioned by the Congress in ERISA. *See* H.R. Rep. No. 1280, 93d

10. *See* pp.8-9 *supra*.

Cong., 2d Sess., (1974), *reprinted in* 1974 U.S. Code Cong. & Ad. News 5116-5117; *Citibank Decision*, at 2-6.[11] This determination was affirmed in the *D.C. Opinion*, 596 F. Supp. at 1501-02.

Because the Trust, and participating IRA trusts, have been established as trusts under Connecticut law, and in compliance with I.R.C. § 408, the Bank is subject to significant obligations as Trustee of the Trust and the qualified IRA trusts. Among other things, CBT will be subject to strict requirements of Connecticut law obligating the Bank to administer the Trust and qualified IRA trusts for the exclusive benefit of the Trust participants, and broadly prohibiting trustee self-dealing, third-party interest, undisclosed adverse interests, transactions involving undue influence on the part of a trustee, and fraudulent trustee conduct. *See generally* Restatement (Second) of Trusts §§ 169-185 (1959). In addition, the Bank, as Trustee, is subject to relevant provisions of the I.R.C. and regulations promulgated thereunder, governing, among other things, prohibited transactions by "disqualified persons" (which include fiduciaries). *See* I.R.C. § 4975. These provisions effectively limit the Bank's ability to use Trust assets to purchase its own securities or deposit instruments, to lend or borrow money from the Trust, or otherwise apply trust assets to purposes other than those exclusively benefiting its participants. Similar restrictions are imposed by this Office's fiduciary regulations. *See* 12 C.F.R. §§ 9.12, 9.18(b)(8). CBT has indicated its intention to comply with the above-mentioned provisions of the law.

The fiduciary nature of the Trust is further demonstrated by the purposes for which an individual trustor establishes an IRA trust, and by the restrictions imposed by ERISA which assure that CBT "cannot serve simply as a vehicle for investment" (*D.C. Opinion*, 596 F. Supp. at 1502). The participant is not seeking a short-term profit, but is primarily interested in preservation, management and growth of assets that will be available to him only upon reaching age 59½, or to his beneficiaries in the event of

11. The Trust has sought a ruling from the Internal Revenue Service that it is eligible for treatment under I.R.C. § 408 as a common investment fund.

death, unless the participant is willing to incur substantial tax penalties. *See* I.R.C. § 408(f). Further, the participant's interest in the IRA trust or the investment fund is not transferable except by death. See I.R.C. § 408(a). Accordingly, there is nothing either in the terms or purposes of the Trust or qualified IRA trusts to suggest that they should be treated as anything other than bona fide trust relationships for purposes of our analysis,[12] and we conclude that on the face of the trust relationships established, the Trust represents a bona fide fiduciary service not prohibited by the Glass-Steagall Act. *ICI v. Camp*, 401 U.S. at 624-25, 638. Our views regarding the fiduciary nature of these activities are not adversely affected by the fact that CBT may promote its Trust and other IRA options. *See* discussion at pp. 28-30 *infra*.

Further, we have determined that the hazards and potential abuses created when a commercial bank enters the investment banking business, and against which Congress sought to legislate in the Glass-Steagall Act,[13] do not exist or are negligible in the instant application. *See Citibank Decision*, at 9-11. As we noted therein, the purpose and nature of, among other things, the collective investment of IRA assets, together with the restrictions of the I.R.C., reduce the danger of promotional abuses identified by the Court in *ICI* v. *Camp*. Moreover, we can identify other features of the CBT application which further reduce potential Glass-Steagall Act hazards. For example, applicable provisions

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12. The *California Opinion*, in setting aside the Comptroller's decision in Wells Fargo, disputed this analysis and suggested that the funds were primarily of an investment rather than a fiduciary nature. *See* pp. 21-22 *infra*.

13. In *ICI v. Camp*, the Court identified these hazards and abuses as involving: (i) identification in the public's mind of the bank's reputation with that of a securities firm, with possible erosion of public confidence in the bank if the securities firm fared badly; (ii) the temptation to support the securities firm with unsound loans; (iii) the temptation to make improvident loans to securities issuers in whose securities the bank or its securities affiliate had invested; (iv) the temptation to make loans to customers to purchase securities of issuers whose securities the bank or its affiliate was underwriting; and (v) the interference by the bank's securities business with the bank's ability to provide disinterested investment advice. 401 U.S. at 630-33.

of state and federal law broadly prohibit transactions between the Trust and the Trustee, or indeed any Trustee activities which are not for the benefit of Trust participants. *See* discussion at pp. 4, 16-17 above. Moreover, under federal law (I.R.C. § 408(e)-(f)) and the Trust Agreement, contributions to IRAs and distributions of IRA assets are subject to significant tax-oriented limitations; although assets of an IRA may, under certain conditions, be redirected to another investment option or another IRA trustee, continuous, high-volume Unit redemptions are not expected to occur.

We are aware that the District Court ruling which set aside the *Wells Fargo Decision* did so in part because of doubt regarding the absence of Glass-Steagall hazards present in this type of activity. For example, the court opined that the objectivity of banks' loan decisions and of their investment advice would be as likely to be affected by their promotional interests in this type of fund as by the managing accounts held illegal in *ICI v. Camp*, that the possibility of "roll over" or redemption might exert pressure on banks to sell additional units, and that banks might be tempted to advise customers to purchase shares in such funds for reasons other than the comparative merit of available investments. *California Opinion*, 593 F. Supp. at 854-856. The court also feared that the manner in which the funds were offered and marketed prompted Glass-Steagall concerns, because the promotion of such collective investment funds in competition with mutual funds could tend to create a greater "salesman's stake" than do traditional common trust funds. *Id.*, at 856.

Notwithstanding the court's views, however, we continue to believe that collective funds for IRAs of the sort offered by CBT do not raise significant hazards of the sort legislated against in the Glass-Steagall Act and that our conclusion is supported by the fact that Congress intended for this and other types of collective trust vehicles to be publicly promoted. The *California Opinion*, in focusing on the manner in which the trusts are marketed,

rather than on whether they constitute a genuine fiduciary service, disregards the fact that collective investment trusts are regulated under different rules than common trust funds, and that the former may be promoted and marketed freely. In the case of collective investment funds for IRA trusts, however, Congress has spelled out the fiduciary purpose for which the individual IRA trust is established and has assured that that purpose is a genuine one by imposing statutory restrictions on the use or withdrawal of the trust assets for any other reason. Moreover, the strict limits on the amounts that may be contributed to tax-exempt IRA trusts make collective investment trusts of IRA assets inappropriate and impractical for general investment objectives.

In addition, the legislative history of certain 1970 amendments to the federal securities laws made clear the congressional intent that statutory tax-exempt collective investment trusts be promoted and marketed freely. In this regard, the Senate Report, in commenting on the fact that collective investment trusts for "Keogh plan" assets were being exempted from certain provisions of the securities laws but not from others, stated that the reason for not exempting them from the registration provisions of the Securities Act was because interests in such collective trusts would be sold to unsophisticated investors, i.e., publicly marketed.[14] Similarly, the applicability of the federal securities laws to the Trust demonstrates that Congress contemplated that retirement vehicles of this nature would be marketed to the public and thus, wished to impose the disclosure requirements of those laws.

As to the concerns regarding the hazards and abuses at which the Glass-Steagall Act is directed, the *D.C. Opinion*, in affirming the *Citibank Decision*, pointed out that the *California Opinion* was in error in failing to recognize that both Glass-Steagall and

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14. "The amendment does not exempt interests or participation by either *bank collective trust funds* or insurance company separate accounts in connection with 'H.R. 10 Plans,' because of their fairly complex nature as an equity investment and *because of the likelihood that they could be sold to self-employed persons, unsophisticated in the securities field.*" S. Rep. No. 184, 91st Cong. 2d Sess., *reprinted in* 1970 U.S. Code Cong. & Ad. News 4897, 4922 (emphasis added).

ERISA permit collective investment by banks of trust assets held either in "common trust funds" or "common investment funds." *D.C. Opinion*, 596 F. Supp. at 1501. It further held that "the dangers found in *Camp*, which Glass-Steagall was designed to prevent, *"are simply not present in this kind of collective IRA trust asset fund"* (emphasis added). *Id.*, at 1503. Rebutting the fears expressed by *California Opinion*, the *D.C. Opinion*, recognized that the "promotional interests" hazard is non-existent or negligible and the bank has no "salesman's stake" in selling units in such a fund. *Id.*, at 1503. Unlike other types of investments, the Trust is a fidiciary relationship involving tightly regulated and statutorily restricted IRA trust assets. The Trust will be promoted as part of total IRA program offered by CBT, i.e., merely one of several individual retirement options available to its customers, and not as a new and separate collective vehicle for the investment of non-fiduciary assets. The bank's only "stake" here is in selling its service of managing trust assets, a stake it has in every trust situation, whether administered in a common fund or otherwise.

Accordingly, we believe that state and federal legal requirements, as well as the ERISA statutory framework governing IRA trust activities, will substantially control the types of hazards identified in *ICI v. Camp*. Similarly, while the Trust Units are, in one sense, freely purchased or redeemed, the tax disincentives built into premature redemptions effectively limit potential promotional pressures on the Bank. In addition, CBT has represently that it will not promote the availability of loans from its credit department for the purpose of funding an IRA.

In sum, the legal nature of the Trust and qualified IRA trust, coupled with the restrictions on the promotion and availability of the trust for general investment purposes, plainly distinguishes the Trust from the type of managed agency collective account vehicle prohibited under the Glass-Steagall Act. *ICI v. Camp*, 401 U.S. at 638. As the Supreme Court observed, "[T]here is a plain difference between the sale of fiduciary services and the sale of investments." *Id. See also Citibank Decision*, at 6-11; D.C.

Opinion, 596 F. Supp. at 1503. The type of service being offered by CBT through the Trust is precisely that contemplated in *ICI v. Camp*, and we conclude that the Trust may operate in compliance with Sections 16 and 21 of the Glass-Steagall Act. While we reach this conclusion fully aware that a similar one was recently challenged, after careful review we continue to be persuaded that our views are correct.

Our conclusion is not affected by the fact that CBT has chosen to register the Trust, and participations therein, with the SEC under the Investment Company Act and Securities Act, respectively. As noted above, CBT has selected this course of action in light of past SEC and SEC staff interpretations regarding the availability of certain exemptions under these statutes for, among other things, common trust funds and collective pension, profit sharing and retirement accounts (and interests in such funds and accounts).[15] Whatever the merits of the SEC's position, which were discussed at length in the *Citibank Decision* (at pp. 11-18), the fact that registration of the Trust may be required under relevant provisions of the federal securities laws does not affect the legality of the Trust's activities under the Glass-Steagall Act. In *Securities Industry Association v. Board of Governors of the Federal Reserve System* ("Becker"), 104 S. Ct. 2979 (1984), which held that the commercial paper marketed by a commercial bank to its customers constituted a "security" within the meaning of sections 16 and 21 of the Glass-Steagall Act, the Supreme Court relied in part on comparable terms used in provisions of the federal securities laws in reaching its conclusions. In so doing, the Supreme Court stated that the federal securities laws, being (along with the Glass-Steagall Act) part of a series of statutory provisions collectively designed to protect the integrity of the nation's financial markets, provided "considerable evidence" as to the meaning of terms used in the Glass-Steagall Act. 104 S. Ct. at 2987. Both the *D.C.* and *California Opinions*, however, have declined to construe this directive to mean that the applicability

15. *See. e.g.*, Section 3(a)(2) of the Securities Act (15 U.S.C. § 77c(a)(2)); Sections 3(c)(3) and 3(c)(11) of the Investment Company Act (15 U.S.C. §§ 80a3(c)(3) and 80a3(c)(11)).

of the federal securities laws to a particular bank activity necessarily must mean that that activity is illegal under the Glass-Steagall Act. *D.C. Opinion*, 596 F. Supp. at 1501; *California Opinion*, 593 F. Supp. at 853.

Further, as has been recognized both by the courts and by the Congress, banks have long been in the business of collectively investing assets held in trust, as well as statutory tax-exempt employee benefit and retirement assets. *See, e.g., ICI v. Camp*, 401 U.S. at 658; *California Opinion*, 593 F. Supp. at 853; *D.C. Opinion*, 596 F.Supp. at 1501; H.R. Rep. No. 1280, 93d Cong., 2d Sess. 316-317 (19740), *reprinted in* 1974 U.S. Code Cong. & Ad. News 4639, 5117-8. Under the current scheme of federal securities regulations, however, many of these activities are subject to provisions of the federal securities laws because they involve the purchase or sale or a "security," but are statutorily exempted from the substantive regulatory provision of the securities laws. *See, e.g.*, Securities Act Section 3(a)(2), 15 U.S.C. § 77c(a)(2) (exemptions for interests in a bank-administered common trust fund or interests in certain kinds of statutory tax-exempt employee benefit funds). Inasmuch as banks have been offering these types of collective investment services without significant questions being raised as to their legality under the Glass-Steagall Act, the potential applicability of the federal securities laws to bank common trust and employee benefit activities generally, and to the CBT Trust specifically, does not, in our view, bear on their legality under the Glass-Steagall Act. The mere fact that interests in the Trust qualify as "securities" within the meaning of the securities laws does not mean that they are "securities" forbidden to banks by the Glass-Steagall Act. Such a conclusion would, as the *California Opinion* recognized, invalidate all bank collective investment vehicles. 593 F. Supp. at 853. As the *Becker* decision itself establishes, the prohibitions of the Glass-Steagall Act should not be read to deprive banks of powers which are authorized to them under the national banking laws, 104 S. Ct. 2991, n. 11, and we see no reason in the case of the Trust to permit its legality pursuant to the express authorizations of the

national banking laws and ERISA to be affected by the possible application of federal securities regulatory requirements.

C. Legality of Advertising

We have also separately considered the extent to which the legality of this type of collective investment fund is affected by the manner in which it is marketed. In the *California Opinion*, the court accepted the assertion by plaintiff ICI that the bank had violated the Glass-Steagall Act by advertising its fund to the public. 593 F. Supp. at 855-856. Upon further consideration of the issue, we continue to believe that the promotion of the Trust does not detract for its legality under the Glass-Steagall Act.

CBT proposes to market the Trust by means of an advertisement which promises to "keep track of all of the paperwork," to "take care of everything," and to provide the "best IRA with the investment option that suits your needs." It further says "invest your money any way you like" and list the three available IRA options (see p. 5 above) of which the Collective Investment Trust is last. There is no attempt to highlight the latter or to give it any special emphasis. CBT is not advertising the Trust itself. On the contrary, it is advertising and marketing its entire IRA trust service The advertising of the Trust is used to attract customers to utilize CBT as their IRA trustee. As the *D.C. Opinion* pointed out in upholding the *Citibank Decision*, there is nothing improper about a bank advertising its services to the public. 596 F. Supp. at 1503-1504.[16] Nor is there anything in ERISA, Glass-Steagall, or any other statute which prohibits the marketing of a bank's IRA trust services by the means of publicizing its IRA collective investment funds. The only limitation on advertising any common trust is inapplicable in this case since the Trust consists solely of tax-exempt retirement assets. 12 C.F.R. §§ 9.18(a)(1),(2), (b)(5)(v).

16. *Franklin National Bank v. New York*, 347 U.S. 373 (1954). *See also NYSE v. Smith*, 404 F. Supp. 1091, 1097 (D.D.C. 1975), *vacated on other grounds sub nom. NYSE v. Bloom*, 562 F. 2d 736 (D.C. Cir. 1977), *cert. denied*, 435 U.S. 942 (1978).

Moreover, to hold that advertising or promoting IRA trust services violates Glass-Steagall would totally frustrate the purposes of ERISA. *D.C. Opinion*, 596 F. Supp. at 1504. In enacting ERISA, Congress intended to encourage retirement savings by all classes of the working public at all levels of income. Since the majority of working people cannot be assumed to know all available options permitted by law for management of their retirement assets, it seems evident that only by some sort of public advertising can the general public be made aware of the opportunities available for preparing for retirement. ERISA permits collective investment as the only feasible form for management of small IRA accounts. Without publicity, individual settlors may not be aware of this option. *See also* discussion at pp. 22-24 above.

In effect, what CBT is advertising and selling is a fiduciary service of managing trust assets. Investing these assets collectively is simply the method by which such service must be offered if it is to be economically practicable. Advertising this service is a permissible activity which is neither prohibited by any existing statute nor contrary to any legislative purpose.

Conclusion

Upon extensive analysis of the request and supporting materials submitted by the Bank, we have concluded that the activities of the Trust, as described above and in the materials submitted, represent a bona fide fiduciary service which complies, with the permission granted herein pursuant to 12 C.F.R. § 9.18(c)(5), with the requirements of 12 U.S.C. § 92a and 12 C.F.R. Part 9 promulgated thereunder, and also complies with relevant provisions of the Glass-Steagall Act. Accordingly, for the reasons stated above, it is our opinion that the Bank may lawfully offer this fiduciary service.

/s/ C. T. CONOVER

C. T. Conover
Comptroller of the Currency

Dated: 2/7, 1985

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NEWS RELEASE

Comptroller of the Currency
Administrator of the National Banks

NR 83-25

Washington, D.C. 20219

For: Release After 9:00 A.M., April 3

Date: April 2, 1984

Remarks by

C. T. Conover
Comptroller of the Currency

Reserve City Bankers Convention
Boca Raton, Florida

April 3, 1984

BOOM OR DOOM: WHAT'S IN THE CARDS FOR COMMERCIAL BANKS?

It's a pleasure to be here today. I would like to talk about something that is extremely important to all of us—what's in the cards for commercial banks.

Today we stand at a crossroads; the path we choose will determine the future of commercial banking. Down one road is the bright promise of competition restored. Down the other is the threat of reregulation and a much smaller market share. Which path will it be, boom or doom? Much of it depends on how banks change their ways in the future.

As some of you are aware, there is one whole side of Congress that wants to turn back the clock and reregulate the financial services marketplace. It would be a big mistake to take their intentions lightly.

In spite of the benefits from removing interest rate ceilings, neither Congress nor consumers have been convinced of the need

for further deregulation. Banks have done a poor job of educating the public about the changes that are occurring. And they have taken too many things for granted.

Customers don't understand that banks have to charge higher fees to cover the increased costs that resulted from interest rate deregulation. Banks don't explain it to them, but somehow expect them to understand anyway. Too many banks change their fee structure and let customers find out about the change the hard way—when they use the service. Other banks don't tell customers how long it will take for a check to clear. And then they wonder why consumers have soured on deregulation.

But the future of commercial banking doesn't have to be bleak. Remember I told you there were two paths. I'd like to take out my crystal ball and describe what the future of commercial banking could be and what it could mean to your customers. Then, I will lay out a plan to help us get to that bright future we all want.

BANKING IN THE YEAR 2000

As I gaze into the crystal ball, I can see that we are in the year 2000. Banks have been given extensive product powers and can branch without restrictions. Other firms have opened consumer banks. Regulation is now based on function rather than charter. So banks, savings and loans, brokerage firms, and insurance companies look very much alike. They offer the same products and services, are regulated by the same regulators, and are competing for the same customers.

The computer has totally changed the role and practice of banking as we know it. Bankers no longer wait for a customer to walk through the door. In fact, extensive networks of brick and mortar branches are obsolete. Instead, banks take advantage of the most modern technology in voice, data, and visual communications. A well-developed network of home terminals is in place that permits consumers to access information at any time of the day or night. Of course, it is possible to transfer funds, purchase stocks or other investments, buy insurance, list real estate, and

secure the most favorable mortgage terms, all without venturing from your living room.

The bank has become the ultimate financial intermediary. Their biggest product is information. They are tied directly into a variety of computerized information networks and can access the latest research data instantaneously.

In fact, through their computer terminals customers have access to virtually all investment tools. Programs are available that rank and rate potential investments based on risk and return and a variety of other variables. The bank can provide business or individual customers with tailor-made lists of possible investment alternatives that meet the specific requirement of their individual investment strategies. These investment instruments include stocks, bonds, mutual funds, time deposits, money market funds, pool of mortgages, business and consumer loans, gold and precious metals, commodities or anything else considered valuable in the year 2000.

I can also see that from this close communication an increased level of customer loyalty has developed. Where customers once went to a dozen different institutions to obtain financial services, they now depend upon a single institution. The bank is the customer's link to tax planning advice, and real estate and insurance activities. Naturally banks even handle equipment leasing, travel and entertainment services, and a variety of other specialized services.

CONSUMERS, BUSINESSES, AND BANKS ARE BETTER OFF

I wouldn't be much of a soothsayer if I couldn't tell you who the winners will be in this new world of financial services. I can see that while banks will benefit, consumers and small businesses are the real winners from this new competition. They are receiving better products and services at better prices and are able to use a more convenient delivery system. Let me describe a few specific ways that they have gained in this new marketplace.

Banks offer cash management services that compete directly with those provided by securities firms. The forces of competition have lowered the minimum deposit requirements and made these accounts available to more consumers and businesses.

Banks originate, package, and sell loans and equity participations to investors. This provides a lot more long term capital for businesses and a lot more jobs. Banks even package small business loans as mutual funds which they privately insure.

With insurance powers, banks also have developed credit insurance for commercial loans. This insurance is an essential part of a flowering secondary market. Banks also provide other flexible insurance products at cheaper rates, and they charge lower real estate fees and cheaper rates for leasing equipment.

To sum it all up, the future for financial services looks like a winning proposition for banks, consumers, and businesses. It is providing more flexible services that better meet everyone's needs.

WHERE WE ARE TODAY

In a real sense, the marketplace is developing along the lines I have just described. Technology is taking on increasing importance each day. One of your strengths is that you realize this better than many of your competitors. But to participate in the fast-paced future I have just described requires action. You will have to find a way to move successfully from the restrictive world of Glass-Steagall, Douglas and McFadden to one where banks are allowed to participate and compete.

OCC HELPS THE TRANSITION

The Comptroller's office has been acting as an agent of change to help ensure that banks can make the transition to this new world of financial services. But we can't do it alone.

Since I became Comptroller, we have been able at least to loosen the choke hold of unnecessarily tight restrictions on commercial banks. We have authorized commercial banks to offer discount brokerage and investment advisory services. We have

permitted banks to provide common trust funds for the collective investment of IRA contributions. We have allowed them to operate futures commission merchant subsidiaries, to lease space to insurance agents, and to provide credit life insurance, and to offer plain English trusts which can broaden the market for trust services.

In addition, we have given banks greater flexibility in structuring loans to meet the needs of the marketplace. We raised the legal lending limit. We have significantly liberalized our real estate regulations. We issued a flexible regulation on adjustable-rate mortgages. We removed portfolio limits and restrictions on loan-to-value ratios and terms to maturity for real estate loans. And we permitted banks to enforce due-on-sale clauses.

Barriers to entry into the financial services system have also been reduced. The procedures for obtaining a national bank charter have been streamlined. The process for forming and acquiring operating subsidiaries has been simplified. And we eliminated or reduced the length, complexity and processing time for many of our applications.

WHAT STILL NEEDS TO BE DONE

But today the job is still only half done. The full benefits of deregulation will only be available to bank customers when banks get added flexibility through new product powers, a removal of geographic barriers, and regulation based on function. Legislation is now being considered that would address each of these areas.

The new Garn Bill would provide you with the new product powers you need to compete with Sears, Merrill Lynch and American Express. At the same time it would complete the process of interest rate deregulation by allowing you to pay interest on demand deposits.

The new Garn Bill would also be a politically realistic first step to interstate banking. It would put the federal blessing on the regional approach to interstate banking.

The recommendations of the Bush Task Force would bring us closer to functional regulation. The Federal Reserve would keep regulatory authority over the 50 biggest bank holding companies, but other national bank holding companies would be regulated by the same regulator as all national banks. The FDIC would concentrate on deposit insurance; the SEC would regulate bank securities activities; and the Justice Department would handle bank mergers.

All the ingredients are there for a boom in commercial banking. Now you need a plan to make legislative proposals become laws.

A PLAN FOR THE FUTURE

To get what you want, further deregulation, there are three things you're going to have to do.

First, banks have to communicate better. They must keep the public informed about fees, funds availability, and other customer obligations.

Second, the banking industry has to explain the benefits of further deregulation to its customers. Tell them how they will benefit from one-step financial shopping. Let them know that when you have insurance and real estate powers, they will pay lower costs. Explain that by gathering and pooling mortgages and selling mortgage-backed securities, mortgage interest rates will become more competitive. Tell them that you will be able to provide better services for small business. Let them know about all the benefits they stand to gain.

Then, when you have convinced your customers that further deregulation is a good idea, the next step is selling it to Congress. You'll discover that is much easier to do, after you have sold the need for deregulation to their constituents, your customers.

Reregulation may be a dirty word to everyone in this room, but it is also one that none of us can afford to ignore. It's a big dark cloud looming over what could be a bright future. Don't let it rain on your parade.

That's my prescription for success. It's going to take decisive action on your part. Today nobody wants to give the banks anything. If you want further deregulation, you're going to have to fight for it, and it will be an uphill battle. But it's better than the alternative. So which will it be—boom or doom? It's up to you.

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NEWS RELEASE

Comptroller of the Currency
Administrator of the National Banks

No. 82-44

Washington, D.C. 20219

Immediate Release

Contact: Leonora S. Cross
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October 28, 1982

Dean DeBuck
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The Office of the Comptroller of the Currency (OCC) today announced that it has approved an application by Citibank to operate trust funds for the collective investment of assets from individual retirement accounts (IRAs). The OCC said the offering of this fiduciary service will benefit the public by providing new investment opportunities for IRA holders.

The OCC said that national banks have authority to collectively invest IRA trust assets under its trust regulations and provisions of ERISA. It also stated that the Glass-Steagall Act was not an impediment to the offering of this fiduciary service.

Under the plan, Citibank would act as trustee of the individual IRAs. It would be directed to invest the IRA assets in one or more trust funds maintained by the bank. It intends to register the funds with the Securities and Exchange Commission under the Investment Company Act and to register the offering of interests in the funds under the Securities Act. As trustee, the bank would also act as investment adviser and perform other services for the funds.

Because some requirements of the Investment Company Act and the Securities Act might conflict with certain provisions of the OCC's trust regulations, the bank asked the OCC to waive those provisions to permit compliance with the securities laws. The OCC said that although it was not clear that there would be

any conflict with these regulations, it would waive those provisions, and the application was approved.

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

THE INVESTMENT COMPANY INSTITUTE,
Plaintiff,

v.

C. T. CONOVER, COMPTROLLER OF THE CURRENCY, *et. al.*,
Defendants.

Civil Action No. C-84-0742
Hearing: August 24, 1984 11:00 a.m.

DEFENDANTS' MOTION TO FILE OVERSIZE BRIEF

Defendants, by their undersigned attorneys, move this Court to enter the attached Order permitting them to file a reply brief in further support of their Motion to Dismiss or, in the Alternative, for Summary Judgment, and in opposition to plaintiff's Cross-Motion for Summary Judgment, which exceeds the normal length established by Rule 220.4 of this Court. This action raises the issue whether national banks may in the exercise of their fiduciary powers establish and maintain collective investment trust funds for the purpose of collectively investing assets received by such banks as trustees of Individual Retirement Account ("IRA") trusts. The issue involves complex legal questions about banking institutions and the banking statutes. Plaintiff and defendants agree that this is an issue of great significance not only to the two banks involved here but also to the entire banking industry and the nation's financial community. A full briefing should aid the Court in resolving this important issue. The granting of this Motion is therefore warranted and in the interests of justice.

Wherefore, defendants respectfully request that this Court grant this Motion and enter the attached Order.

Respectfully submitted,
RICHARD K. WILLARD
Acting Assistant Attorney General

JOSEPH P. RUSSONIELLO
United States Attorney
/S/ SANDRA M. SCHRAIBMAN

SANDRA M. SCHRAIBMAN
/S/ THOMAS H. PEEBLES

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

INVESTMENT COMPANY INSTITUTE,
Plaintiff,

v.

C. T. CONOVER, *ET AL.*,
Defendants.

Civ. No. H-85-160 (JAC)

FEDERAL DEFENDANTS' SUPPLEMENTAL MEMORANDUM IN RESPONSE TO QUESTIONS POSED BY THE COURT

Question 1: Does the failure of Congress to enact a law that would authorize an activity preclude an administrative agency from giving approval to that activity in absence of legislation?

The answer is that an administrative agency may allow an activity encompassed by proposed but unenacted legislation, so long as the activity does not contravene existing legislation. In that regard, later proposed but unenacted legislation is a poor guide to the intent of a former Congress (and thus of existing legislation). *See, Port of New York Authority* v. *Baker, Watts & Co.*, 392 F.2d 497, 503 (D.C. Cir. 1968).

Even more significantly, the proposed but unenacted legislation on which plaintiff relies is irrelevant to the case at bar. That proposed legislation would have given banks authority to engage generally in the mutual fund business, *i.e.* to offer a pooled fund to the public as an investment vehicle alone, free from the limitations, restrictions, mandated purpose and protections that inhere in tax-exempt employment trusts eligible for participation in a collective investment trust. That Congress has not enacted such general mutual fund legislation has no effect whatsoever, legal or logical, on the permissibility of a collective investment trust.

Question 2: Does CBT's voluntary registration of the Collective Fund with the Securities and Exchange Commission provide evidence of registrability and/or is it akin to an estoppel preventing CBT from arguing that the Collective Fund is not subject to the requirements of the Securities Act?

In response to this question, we would first emphasize that the Comptroller in no way argues that the Collective Fund, and interests therein, are not subject to registration under the securities laws.[1] Thus, he is perfectly willing to accept the conclusion that they are subject to registration, whether because the law so provides or because CBT's actions have made them so.[2]

The point relevant to this action is that the status of interests in the Collective Fund as "securities" under the *Securities Act*—whether exempt or non-exempt, registered or unregistered—does not render them the "securities" forbidden to banks by the Glass-Steagall Act. Several factors demonstrate the inescapability of this conclusion:

1. Most obviously, interests in collective investment trusts for Keogh plan assets are not only "securities" within the meaning of the Securities Act, but also are (unless exempt under some other provision) *registered* under that Act, pursuant to deliberate Congressional mandate. (*See, Federal Defendants' Memorandum in Support of Motion for Summary Judgment* at 22-23, 30-32).

1. The SEC has advised the Comptroller that it is its position that the Collective Fund is subject to registration under the Investment Company Act and that interests in the Collective Fund are subject to registration under the Securities Act. It takes no position as to whether these registrations, or any other factor, cause the Collective Fund to run afoul of the Glass-Steagall Act, because this is solely a matter of banking law interpretation. If the Court is inclined to make a determination on whether the Collective Fund and interests therein are required to be registered under the federal securities laws, an issue which the SEC does not believe is properly before the Court, the SEC respectfully requests permission to be heard on this issue.

2. It is true that, in his Citibank ruling, the Comptroller did question the applicability of the registration provisions to IRA collective investment trusts. This discussion was in no way material to the decision. In all the Comptroller's IRA rulings and in all filings made in court to defend those rulings, the Comptroller has taken the position that, whether or not IRA collective investment trusts are subject to registration under the securities laws, they do not violate the Glass-Steagall Act.

This does not render them "securities" for Glass-Steagall Act purposes or in any way cause such collective investment trusts to run afoul of that Act. Thus, registration is not and cannot be a factor causing a collective investment trust to be illegal.

2. ERISA's own legislative history shows that Congress contemplated that IRA collective investment trusts would or could

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IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 84-2623

INVESTMENT COMPANY INSTITUTE,
Plaintiff-Appellee,

v.

C. T. CONOVER, AS COMPTROLLER OF THE CURRENCY, ET AL.,
Defendants-Appellants,

and

WELLS FARGO BANK, ET AL.,
Defendants-Intervenors-Appellants,

ON APPEAL FROM THE ORDER OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

MOTION FOR LEAVE TO FILE A BRIEF AND BRIEF OF THE AMERICAN BANKERS ASSOCIATION AS AMICUS CURIAE

JOHN J. GILL
General Counsel
MICHAEL F. CROTTY
Associate General Counsel-Litigation
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ASSOCIATION
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April 1, 1985

Since Individual Retirement Accounts ("IRAs") were created by the Employee Retirement Income Security Act of 1974, and most especially since IRA's were made more widely available after 1981, commercial banks represented by the American

Bankers Association have been among the principal trustees holding such accounts for the American public. In order to achieve maximum efficiency in the administration of IRA trusts, and thus provide the greatest rate of return to IRA owners and their beneficiaries, it is desirable to commingle the assets of many individual accounts in a common trust or common investment fund. Such a procedure is specifically authorized by section 408(a)(5) of the Internal Revenue Code. The Comptroller of the Currency has approved the applications of several national banks to do precisely what the law authorizes—commingle the assets of various Individual Retirement Accounts in a common fund for investment. This case is one of three currently pending legal challenges to the Comptroller's actions. The commingled IRA account program of Citibank, N.A., was challenged unsuccessfully in the United States District Court for the District of Columbia, *Investment Company Institute v. Conover*, 596 F. Supp. 1496 (D.D.C. 1984), but the case is now on appeal. In the court below, the similar programs of Wells Fargo Bank and Bank of California was successfully challenged, *Investment Company Institute v. Conover*, 593 F. Supp. 846 (N.D. Cal. 1984), and litigation over the commingled IRA account program of Connecticut Bank & Trust Co. remains pending in the United States District Court for the District of Connecticut. *Investment Company Institute v. Conover*, Civil Action No. H-85-160 JAC (D. Conn. filed Feb. 26, 1985).

Obviously, therefore, this is an issue of nationwide importance to the banking industry. If the decision of the district court is upheld in this case, it would deprive commercial banks in this Circuit of the opportunity to offer a valuable service to their customers, deprive those customers of the benefits to be realized from that service and cast substantial doubt upon the ability of commercial banks outside this Circuit to offer the service.

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Cases Nos. 84-2622, 84-2623

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

INVESTMENT COMPANY INSTITUTE,
Plaintiff-Appellee,

v.

C. T. CONOVER, Comptroller of the Currency; OFFICE OF THE COMPTROLLER OF THE CURRENCY, An Agency of the United States, and THE UNITED STATES OF AMERICA,
Defendant-Appellants,

and

WELLS FARGO BANK, N.A.;
and THE BANK OF CALIFORNIA, N.A.,
Defendants-Intervenors-Appellants,

OPENING BRIEF OF DEFENDANTS APPELLANTS AND DEFENDANTS INTERVENORS—APPELLANTS

Appeal from the United States District Court for the Northern District of California Honorable William W Schwarzer, Judge District Court No. C-84-0742-WWS

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[Material Omitted]

on the advertising of common trust funds. Like Regulation F after the 1955 amendment, it does not impose these restrictions on collective investment trusts.[9]

3. ERISA and Individual Retirement Accounts

As noted, collective investment trusts consist solely of assets of tax-exempt employment-related trusts. Prior to 1974, only two general types of such trusts were authorized by the tax laws: those exclusively for the benefit of employees, and those established by and for self-employed individuals, called "Keogh" or "H.R. 10" plans. In 1974, Congress created another employment related trust, the IRA trust.[10] This was accomplished by ERISA, which added Section 408 to the Internal Revenue Code ("IRC"). ERISA was designed to encourage all working people to establish IRA's and to offer these individuals the same type of benefits and opportunities available to employee and Keogh plans.

9. Regulation 9, as originally promulgated in 1963, omitted the requirement that commingled trusts be established for "bona fide fiduciary purposes"; and did, however, impose restrictions on the advertising of common trust funds and collective investment trusts alike. In 1972 the Comptroller amended the Regulation to rescind advertising and publicity restrictions with regard to collective investment trusts. Such restrictions still apply to common trust funds. 37 *Federal Register* 24161 (1972).

10. ERISA defines an IRA as a "trust created or organized in the United States for the exclusive benefit of an individual or his beneficiaries," pursuant to a "written governing instrument" meeting certain requirements. IRC § 408(a). An IRA can also be established as a custodial account, but only if the account fulfills all the other requirements for an duties imposed on an IRA trustee. Such an account is "treated as a trust" and the custodian "treated as the trustee thereof." IRC § 408(h). Even so, such accounts may not be commingled by a bank because the assets are not received in trust. Since the IRA's in issue are all trusts, the custodial account provisions are irrelevant.

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IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

INVESTMENT COMPANY INSTITUTE,
Plaintiff-Appellee,

vs.

C. T. CONOVER, Comptroller of the Currency; OFFICE OF THE COMPTROLLER OF THE CURRENCY, An Agency of the United States, and THE UNITED STATES OF AMERICA,
Defendant-Appellants,

and

WELLS FARGO BANK, N.A.;
and THE BANK OF CALIFORNIA, N.A.,
Defendants-Intervenors-Appellants.

Nos. 84-2622
84-2623

PARTIAL TRANSCRIPT OF ELECTRONIC TAPE RECORDINGS
MONDAY, AUGUST 12, 1985

REPORTED FROM ELECTRONIC TAPE RECORDING BY: CLINT MILLER

[material omitted]

created these investments or supervisory committees and we have quite an argument here that the effect of that is to dilute the role of the bank as trustee and in effect result in delegation of trust powers arguably to a supervisory committee which does not act in the same trust fiduciary responsibility.

Let me ask this question, since you're talking about ERISA. In Section 408 it's clear from reading 408 A5 in conjunction with 408 A2 that Congress contemplated that banks as trustees would have common investment funds, would be commingled as funds for investment purposes. My question of you is, if this Court, and I guess perhaps ultimately the Supreme Court, were to agree with the District Court in this case rather than the District Court in the District of Columbia, would the banks be through, would the

banks just be prohibited flatly from collectively investing IRA accounts?

MR. SULLIVAN: I think not.

THE COURT: How would they do it without running afoul of the law or running afoul of Glass-Steigel?

MR. SULLIVAN: It comes down to advertising. I think if they had them, kept them in the back room where someone got after some significant contact with the bank, that the person could ultimately learn about the product and could get into it.

THE COURT: Okay, that's one thing, but let's suppose the real reason for the Court's decision is the existence of the supervisory committee, not the promotion, then where are you?

MR. SULLIVAN: Well, I would—

THE COURT: Let's suppose that ultimately the Supreme Court were to decide that fine, it makes perfectly good sense to permit the banks to advertise the range of options available to IRA investors. All right, so we get that, but wait a minute, we decide that you are not really selling trust services because you have diluted your role as trustee by organizing these supervisory committees and we are having difficulty now distinguishing these collective investment trusts from the traditional mutual funds, which we said were subject to Camp, then where are you?

MR. SULLIVAN: I think we're at a point where the particular form has been undercut so the bank in this particular form can't do that, it would have to go back and obtain an exemption or perhaps not be able to offer it if the exemption was granted without registering, going through an elaborate process, but the point is, and, Your Honor, I would suggest a different interpretation on the dilution, as you call it—

THE COURT: I want to stick with the question that I have, you haven't really answered it, Counsel. Let me

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IN THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 85-5019

INVESTMENT COMPANY INSTITUTE,
Appellant,

v.

C. T. CONOVER, ET AL.,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

AMERICAN BANKERS ASSOCIATION MOTION FOR LEAVE TO FILE A BRIEF AS AMICUS CURIAE

In accordance with the provisions of Rule 29 of the Federal Rules of Appellate Procedure, the American Bankers Association hereby respectfully petitions the Court for leave to file the attached Brief as Amicus Curiae in support of the Appellees. The American Bankers Association is the largest national trade association of the commercial banks in the United States, including banks chartered by the Comptroller of the Currency ("national banks") and those chartered by the states in which they are located ("state banks"). ABA member banks are located in each of the fifty states and the District of Columbia.

Since Individual Retirement Accounts ("IRAs") were created by the Employee Retirement Income Security Act of 1974, and most especially since IRA's were made more widely available after 1981, commercial banks represented by the American Bankers Association have been among the principal trustees holding such accounts for the American public. In order to achieve maximum efficiency in the administration of IRA trusts, and thus provide the greatest rate of return to IRA owners and their beneficiaries, it is desirable to commingle the assets of many individual accounts in a common trust or common investment fund. Such a

procedure is specifically authorized by Section 408(a)(5) of the Internal Revenue Code. The Comptroller of the Currency has approved the applications of several national banks to do precisely what the law authorizes—commingle the assets of various Individual Retirement Accounts in a common fund for investment. This case is one of three currently pending legal challenges to the Comptroller's actions. The commingled IRA account program of Citibank, N.A., was challenged unsuccessfully in the Court below, *Investment Company Institute v. Conover*, 596 F. Supp. 1496 (D.D.C. 1984). The similar programs of Wells Fargo Bank and Bank of California were successfully challenged in *Investment Company Institute v. Conover*, 593 F. Supp. 846 (N.D. Cal. 1984), and that case is now on appeal. Litigation over the commingled IRA account program of Connecticut Bank & Trust Co. remains pending in the United States District Court for the District of Connecticut. *Investment Company Institute v. Conover*, Civil Action No. H-85-160 JAC (D. Conn. filed Feb. 26, 1985).

Obviously, therefore, this is an issue of nationwide importance to the banking industry. If the decision of the district court is reversed in this case, it would deprive commercial banks of the opportunity to offer a valuable service to their customers and deprive those customers of the benefits to be realized from that service.

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IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

INVESTMENT COMPANY INSTITUTE,

Appellant,

v.

C. T. CONOVER,
COMPTROLLER OF THE CURRENCY, et al.,

Appellees.

No. 85-5019
Wednesday, December 11, 1985
Washington, D.C.

The above-entitled matter came on for oral argument, pursuant to notice, at 10:15 a.m.

BEFORE:

CIRCUIT JUDGES SCALIA AND STARR.
(Senior Circuit Judge McGowan is also a member of this panel and will consider the case on the briefs and the tape recording of the oral argument.)

APPEARANCES:

HARVEY L. PITT, ESQ., Fried, Frank, Harris, Shriver & Jacobson, Suite 1000, 600 New Hampshire Avenue, N.W., Washington, D.C. 20037; on behalf of Appellant

L. ROBERT GRIFFIN, ESQ., Office of the Comptroller of the Currency, Washington, D.C.; on behalf of Appellee, Comptroller of the Currency

[Material Omitted]

does?

MR. PITT: Well—

QUESTION: And I cannot imagine that the case is not such an important one that it bears a petition for certiorari to the Supreme Court. The Court is going to turn it down until there is a circuit conflict.

MR. PITT: I think Your Honor is correct, that this case we do perceive as being sufficiently important that a circuit conflict may not be necessary, although—

QUESTION: And either side is going to go up from the Ninth Circuit.

MR. PITT: I would assume that.

QUESTION: Has the case been argued incidentally in the Ninth Circuit?

MR. PITT: The case has been argued in the Ninth Circuit. It was argued on August 12th before Judges Norris, Reinhardt, and Coughenour who is a District Judge sitting by designation. The case is under submission. I might add, Your Honor, that after the initial decision came down from Judge Schwarzer in the Central District of California, we did two things. We asked the Comptroller if he would refrain from issuing additional rulings until we could get this issue resolved in the courts. We also sought to reach an agreement on the form of some kind of stay of proceeding and there was over the telephone an

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